APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12356 SEPTEMBER TERM, 1958 SEPTEMBER SESSION, 1958.

OTTO BEHIMER and JOHN A. ROBERTS,
Petitioners,

v.

Honorable PHILIP L. SULLIVAN, Chief Judge of the United States District Court for the Northern District of Illinois,
Respondent.

Petition for Writ of Mandamus

November 26, 1958

Before DUFFY, *Chief Judge*, and MAJOR and SCHNACKENBERG, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Petitioners for a writ of mandamus, Otto Behimer and John A. Roberts, citizens of Illinois and New York, respectively, filed their complaint for damages in the District Court for the Northern District of Illinois, Eastern Division, against Standard Oil Company and Standard Oil Foundation, Inc., Indiana corporations, on behalf of themselves and other minority

stockholders of Utah Oil Refining Co. (herein referred to as UTOCO), a Utah corporation.

The allegations of the complaint, in substance, are that defendants owned a large majority of the stock of UTOCO, approximately 77.6% of the total of 1,391,116 shares of the outstanding stock; that plaintiffs owned 1,900 shares; that 140,519 shares were owned by (to use petitioners' words) "controlled stockholders"; that the officers and directors of UTOCO were under the control and domination of defendants; that, pursuant to an agreement between defendants and UTOCO, a Delaware corporation, wholly owned by Standard Oil Company, was formed; that the only asset of the Delaware corporation was stock of Standard Oil Company; that the Delaware corporation purchased all of the assets of UTOCO and paid therefor with Standard Oil stock so that the only asset of UTOCO became the Standard Oil stock; that this stock, in turn, was distributed to UTOCO stockholders at the rate of one share of Standard for each two shares of UTOCO; and that, after the distribution, UTOCO caused itself to be dissolved.

The complaint further alleges that the "oppressive action" of defendants and the "controlled stockholders" resulted in defendants' acquiring 100% of UTOCO at a price far below the fair value thereof; that UTOCO stockholders were compelled to become stockholders of Standard Oil Company, and that UTOCO stockholders suffered monetary damages to the extent of the difference between the market value of one-half share of Standard Oil stock and the fair value of one share of their UTOCO stock.

Defendants filed their respective answers and motions to dismiss the complaint, and the following day, before any disposition was made of the motions to dismiss, filed their joint motion to transfer the cause to the United

States District Court for the District of Utah. Pursuant to order of court, defendants filed their affidavit and brief in support of their motion, petitioners filed their affidavit and brief in opposition thereto, and defendants filed a reply brief.

The district court granted the motion for transfer.

Petitioners, in their affidavit and brief before the district court, allege (without denial by defendants) that statutory venue does not exist in the United States District Court for the District of Utah, neither defendant does business there, resides there, or is amenable to service of process there.[1]

Petitioners contend in this court, *inter alia*, that respondent lacked power to transfer the action to the District of Utah. In their petition in this court they say that they could not have brought their suit in the District of Utah.

Respondent's answer to the petition for a writ of mandamus sets forth in detail the facts in the case which he believes justified his order of transfer. He asserts that he assumed "that this court, in issuing its Rule to Show Cause, was not concerned with the fact of my power to transfer."

In his brief, respondent asserts that he did have power to make the transfer pursuant to 28 U.S.C.A. § 1404(a). He states that, in their joint motion to transfer, defendants formally assured the court that their personal appearances would be entered in, and they would waive any legal privilege they might have as to the venue of, the United States District Court for the District of Utah, Central Division.

[1] Defendants have not challenged the statutory venue, 28 U.S.C.A. § 1391 (a), of the District Court for the Northern District of Illinois, Eastern Division. *Cf. Olberding* v. *Illinois Central R. Co.*, 346 U.S. 338, 340.

On the facts before us in this record, we are required to decide whether respondent had power to make the transfer. We hold that he did not have that power. Whether or not he properly exercised his discretion in the mistaken belief that he did have such power, it will be unnecessary for us to decide.

The controlling language is contained in 28 U.S.C.A. § 1404(a):

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

When Congress provided for the transfer of a case to a district "where it might have been brought," it meant the district where plaintiff had a recognized right to bring his case under the Venue Act[2] and that this right was unqualified and absolute, not depending upon consent of the defendant, evidenced by waiver, entry of appearance, or otherwise. If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district "where it might have been brought." If he does not have that right, independently of the wishes of defendant, it is not a district "where it might have been brought," and it is immaterial that the defendant subsequently acquiesces. The test is, did the plaintiff have an independent right to commence suit in the district to which it is sought to make transfer? If so, it is a district "where it might have been brought"; otherwise, it is not such a district. We recognize, of course, that venue may be waived under proper circumstances, but we do not think it can be waived in a forum in which an action has not and could not have been properly brought by the opposing party. To

[2] 28 U.S.C.A. § 1391.

hold otherwise is to permit a defendant to select a forum not available to a plaintiff as a matter of right, and over plaintiff's objection. *Blaski* v. *Hoffman, Judge,* No. 12285 in this court, October 16, 1958, ... F. 2d .....

A writ of mandamus will issue directed to respondent, commanding him to vacate the order entered by him in case numbered 58 C 238, entitled *Otto Behimer and John A. Roberts, plaintiffs,* v. *Standard Oil Company, and Standard Oil Foundation, Inc., Indiana corporations, defendants,* which order transferred said case to the United States District Court for the District of Utah, Central Division, and further commanding respondent to proceed to adjudicate and determine said case according to law.

ORDER MANDAMUS ISSUE.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12356 Wednesday, November 26, 1958

BEFORE

Hon. F. RYAN DUFFY, *Chief Judge*
Hon. J. EARL MAJOR, *Circuit Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

OTTO BEHIMER and JOHN A. ROBERTS, *Petitioners*,

v.

HONORABLE PHILIP L. SULLIVAN, Chief Judge of the United States District Court for the Northern District of Illinois, *Respondent*.

Original Petition for Writ of Mandamus.

This matter comes before the Court on the petition of Otto Behimer and John A. Roberts for a writ of mandamus, the response of respondent thereto, filed pursuant to a Rule To Show Cause heretofore issued by this Court, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that a writ of mandamus issue directed to respondent, commanding him to vacate the order entered

by him in case numbered 58 C 238, entitled *Otto Behimer and John A. Roberts, plaintiffs,* v. *Standard Oil Company, and Standard Oil Foundation, Inc., Indiana corporations, defendants,* which order transferred said case to the United States District Court for the District of Utah, Central Division, and further commanding respondent to proceed to adjudicate and determine said case according to law, in accordance with the opinion of this Court filed this day.

A True Copy:
Teste:

Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12285. SEPTEMBER TERM, 1957, APRIL SESSION, 1958.

JOHN F. BLASKI, et al.,
Petitioners,

v.

HONORABLE JULIUS J. HOFFMAN,
United States District Judge,
Respondent.

} Original Petition for Writ of Mandamus.

July 1, 1958.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir. 1957) is the opinion of the Fifth Circuit denying Blaski, et al., leave to file a petition for a writ of mandamus as a device for vacating an order of transfer from the Northern District of Texas to the Northern District of Illinois. After this case arrived in the United States District Court, Chicago, Illinois, the Texas plaintiffs (petitioners in our court) invoking 28 U.S.C. § 1404(a), asked the respondent district judge to transfer the cause back to Texas. He denied plaintiffs' motion and this mandamus petition followed. The *Blaski* opinion, just cited, adequately states the facts and petitioners' arguments in our court

add nothing substantial — legally or factually. There appears to be no legalistic reason just why the respondent district judge should overrule the Fifth Circuit and we think petitioners fail in making any showing that judicial discretion has been abused. *General Casualty Company of America* v. *Grubb*, ... F. 2d .... (7th Cir. 1958).

The petition for writ of mandamus is

DENIED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12285 — SEPTEMBER TERM AND SESSION, 1958

JOHN F. BLASKI et al.,
Petitioners,

v.

HONORABLE JULIUS J. HOFFMAN,
United States District Judge,
Respondent.

Petition for Writ of Mandamus on Petition for Rehearing.

October 16, 1958

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

MAJOR, *Circuit Judge.* This Court, on July 1, 1958, rendered an opinion denying petitioners' petition for a writ of mandamus. Upon petition for rehearing, it is ordered that such opinion be withdrawn and that all orders entered pursuant thereto be vacated and set aside.

The facts which give rise to the legal issue for decision are not in dispute. Petitioners, as plaintiffs, on March 1, 1957 filed in the United States District Court, Northern District of Texas, Dallas Division (hereinafter referred to as the Texas Court or District), a complaint charging R. P. Howell, Jr. and Lifetime Metal Building Company

with patent infringement. Plaintiffs reside or are doing business within the Northern District of Illinois (hereinafter referred to as the Illinois District). The complaint alleged acts of infringement committed by defendants in the Texas District, and no acts of infringement, so far as known, committed by either of the defendants in the Illinois District. Service of process was had upon defendants in the Texas District. Defendants answered the complaint and the case was set for trial.

In the meantime, defendants submitted a motion requesting transfer of the action to the Illinois District, under Title 28 U.S.C.A. Sec. 1404(a), stating in their motion that defendants waived lack of venue in the Illinois District. Over objection of plaintiffs (petitioners here), the Texas Court directed that, for the convenience of the parties and witnesses and in the interest of justice, the action be transferred to the Illinois District.

Plaintiffs, after denial of their motion to vacate the order of transfer, filed a petition for writ of mandamus in the United States Court of Appeals for the Fifth Circuit, requesting that Court to issue an order to show cause why a writ of mandamus should not be issued against the Texas District Judge, nullifying the transfer order. The Court of Appeals (5 Cir.) held that the District Court was empowered by statute to make the transfer, and denied leave to file the petition. *Ex Parte Blaski et al.*, 245 F. 2d 737.

The papers and records in the Texas District infringement action were received in the Clerk's Office of the Illinois District pursuant to the transfer order. Thereupon, petitioners filed a motion in the Illinois District for an order directing the transfer of and remandment of the action to the Texas District, on the ground that the Texas Court was without power to order the transfer

and, consequently, the Illinois Court did not acquire jurisdiction. A hearing on the petition and response thereto was had before Honorable Julius J. Hoffman, a Judge of the Illinois District and respondent in the instant proceeding. Respondent, on March 14, 1958, entered an order denying petitioners' motion, and in an oral opinion stated his reasons therefor. Thereupon, petitioners filed in this Court the petition now before us for a writ of mandamus directing respondent to order such transfer and remand.

No question is raised, in fact all parties concede that under Sec. 1651 (a), Title 28 U.S.C.A., mandamus is an appropriate means for testing the legality of the order in controversy. Furthermore, our jurisdiction, if there be any doubt, is supported by the decision of this Court in *Chicago, R.I. & P.R. Co.* v. *Igoe*, 212 F. 2d 378.

The questions for decision appear to be correctly stated in petitioners' brief, and are as follows:

> "(1) Whether a district court, having proper venue and jurisdiction over defendants in a patent infringement action, has the power under Section 1404 (a), Title 28, U.S.C.A. to transfer the cause of action, on motion of the defendants and over the objections of the plaintiffs, to a district in which venue is not proper; and
>
> "(2) Whether, under such circumstances, the transferee court acquires jurisdiction, or has the power to accept such a transfer."

Two statutory provisions are pertinent: Secs. 1400 (b) and 1404 (a), Title 28 U.S.C.A. Section 1400 (b), a venue provision, specifically applicable to actions for patent infringement, provides:

> "Any civil action for patent infringement *may be brought* in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business. [Italics supplied.]"

Section 1404 (a), relating to change of venue, provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.* [Italics supplied.]"

It is not open to doubt but that petitioners' action was properly brought in the Texas District, where defendants not only resided but where the acts of infringement took place and where defendants had their regular and established place of business. It appears plain, also, that venue could not properly have been laid in the Illinois District. A solution of the problem before us reduces itself to the legal effect to be given the concluding phrase of Sec. 1404 (a), "where it might have been brought." Does that phrase refer to the district where such an action "may be brought" under Sec. 1400 (b)? If the question was of first impression, we would have no hesitancy in answering in the affirmative. It is a contradiction of terms and does violence to the plan, unambiguous language which Congress has employed, to reason that the Texas Court, with power to transfer the action only to a district "where it might have been brought," could exercise that power by ordering transfer to a district which it could not have been brought.

If the Texas District had the power on motion of defendants to transfer the action to the Illinois District, it likewise had the power on a similar motion to transfer it to any District Court in the United States. Counsel for respondent argues that the Illinois District was one where the action "might have been brought" because it had general jurisdiction of an action for patent infringement and acquired jurisdiction of defendants by their motion to transfer and their consent to trial in the Illinois District. Precisely the same argument could be made in support of the power of the Texas District if transfer had been made to any other District Court in the United

States. Counsel's argument, if accepted, renders the phrase "where it might have been brought" meaningless. The transfer provision would be complete absent the phrase of limitation. This phrase, however, cannot be ignored under the guise of statutory construction; to do so amounts to statutory emasculation.

It must be clearly kept in mind that there is no issue of discretion involved in the instant matter either on the part of the Texas District Judge in ordering the transfer or on the part of the respondent in refusing to remand it. The sole issue is that of power on the part of one to transfer, on the part of the other to accept and entertain jurisdiction. Also, the general rule should not be overlooked that a Federal Court has only such jurisdiction or power as Congress has specifically conferred. The venue where a patent infringement action may be brought, as well as the district to which it may be subsequently transferred, has been clearly delineated by Congress.

When Congress provided for transfer to a district "where it might have been brought," it is hardly open to doubt but that it referred to a district where the plaintiff, in a case sought to be transferred, had a right to bring the case. Under the decisions of the Supreme Court and other courts, the action could have been properly brought only in the district (1) where defendant resides or (2) where defendant has committed acts of infringement and has a regular and established place of business. Under the admitted facts, the action could have been properly brought only in the Texas District. Conversely, it could not have been properly brought in the Illinois District.

In *Stonite Products Co.* v. *Melvin Lloyd Co. et al.*, 315 U.S. 561, the question for determination was whether Sec. 48 of the Judicial Code (Title 28 U.S.C.A. Sec. 109) was the sole provision governing venue of patent litigation. Referring to that section, the Court stated (page 562):

> "Section 48 gives jurisdiction of suits for patents infringement to the United States district courts in the district of which the defendant is an inhabitant, or in any district in which the defendant shall have committed acts of infrigement and have a regular and established place of business."

On the following page the Court stated:

> "We hold that Section 48 is the exclusive provision controlling venue in patent infringement proceedings."

Section 48, before the Court in Stonite, was the predecessor venue provision to Sec. 1400 (b) of the present Code. The holding in *Stonite*, however, is equally applicable to the present venue provision. *Fourco Glass Co.* v. *Transmirra Products Corp. et al.*, 353 U.S. 222. The Court in the latter case stated (page 228):

> "For it will be seen that Section 1400 (b) is equally clear and, also, that it deals specially and specifically with venue in patent infringement actions."

And again, on the following page:

> "We hold that 28 U.S.C. Sec. 1400 (b) is the sole and exclusive provision controlling venue in patent infringement actions * * *."

See also the recent opinion by Judge Mercer in *Gas Products Corp.* v. *George D. Roper Corp. et al.*, 147 F. Supp. 853.

When Congress provided for the transfer of a case to a district "where it might have been brought," it meant the district where plaintiff has a recognized right to bring his case under the Venue Act and that this right was unqualified and absolute, not depending upon consent of the defendant, evidenced by waiver, entry of appearance, or otherwise. If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district "where it might have been brought." If he does not have that right, independently of the wishes of defendant, it is not a district "where it

might have been brought," and it is immaterial that the defendant subsequently acquiesces. The test is, did the plaintiff have an independent right to commence suit in the district to which it is sought to make transfer? If so, it is a district "where it might have been brought"; otherwise, it is not such a district. We recognize, of course, that venue may be waived under proper circumstances, but we do not think it can be waived in a forum in which an action has not and could not have been properly brought by the opposing party. To hold otherwise is to permit a defendant to select a forum not available to a plaintiff as a matter of right, and over plaintiff's objection.

Respondent in his brief states:

> "Petitioners fail to recognize the difference between jurisdiction of the subject matter and venue over the particular defendants. The District Court had jurisdiction of the subject matter at the time the original suit was brought by reason of the very nature of the suit, *i.e.*, patent infringement."

True, every District Court has jurisdiction over patent infringement litigation generally but the suggestion must be novel, certainly not sound, that the Illinois Court acquired jurisdiction of the subject matter of the instant action at the time it was brought in the Texas District. No court, so far as we are aware, in an action for patent infringement or any other, acquires jurisdiction either of the subject matter or of the parties until the action is properly brought in such court. Furthermore, it begs the question to suggest that the Illinois Court acquired jurisdiction via the transfer because that is dependent upon the issue for decision, that is, whether Congress has endowed the transferring court with power to order the transfer. As shown, the action could not properly have been brought in the Illinois Court, and, therefore, it was not a district "where it might have been brought." Con-

sequently, the Texas Court was without power to order the transfer and the Illinois Court acquired neither jurisdiction nor venue of the action.

Our conclusion is based upon what we think is a clear congressional mandate. In *Ex Parte Collett*, 337 U.S. 55, the Court held that the phrase "any civil action" found in Sec. 1404 (a) was applicable to an action under the Federal Employers' Liability Act. In so doing the Court stated (page 58):

> "The court below relied on the language of Sec. 1404 (a), *supra*, which it regarded as 'unambiguous, direct, clear.' We agree. The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded."

In our view, the phrase "where it might have been brought" contained in the same section is equally unambiguous, direct and clear.

Notwithstanding the emphatic view which we entertain, it must be conceded that a solution of the problem has engendered much controversy in the courts and that there is respectable opposing authority, although upon analysis it is not as imposing as counsel would have us believe. An attempt to distinguish or analyze such cases in detail would unduly prolong this discussion. A reading of all the cases where the question has been considered leads to the view that the weight of authority sustains our conclusion in the matter.

Respondent asserts that four Courts of Appeals have sustained the power of the court to transfer under the circumstances of the instant case. *Ex Parte Blaski et al.*, 245 F. 2d 737 (5 Cir.); *In Re Josephson*, 218 F. 2d 174 (1 Cir.); *Anthony* v. *Kaufman*, 193 F. 2d 85, and *Torres* v. *Walsh*, 221 F. 2d 319 (2 Cir.); *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111 (3 Cir.). We regard *Blaski* as

the most important of these cases because the Court refused to entertain a petition for mandamus directing the Texas District to vacate its order of transfer in the instant case. With great respect for that Court, we think its opinion discloses that it, like some other Courts, confused the issue of power to transfer with that of discretion where the power existed. In its opinion the Court stated (page 738):

> "The purposes for which Sec. 1404 (a) was enacted would be unduly circumscribed if a transfer could not be made 'in the interest of justice' to a district where the defendants not only waive venue but to which they seek the transfer."

This reasoning, so we think, ignores the statutory limitation of the power to transfer to a district "where it might have been brought." More than that, a court has no more right to unduly enlarge than it has to unduly circumscribe a limitation which Congress has specifically provided. In any event, we think the decision of the Fifth Circuit in this matter is erroneous. Such being the case, we are under no more obligation to follow it as the law of the case than that Circuit would be to follow what it considers an erroneous decision by this Court. See *Wilson* v. *Kansas City Southern Ry. Co. et al.*, 101 F. Supp. 56, 60.

In all the other cases above cited, except *Torres* v. *Walsh*, it appears that one or more of the defendants could have been sued in the district to which the action was transferred. Thus, the action "might have been properly brought" in such district. The *Torres* case involved an *in rem* proceeding in admiralty which presented a different situation as to venue and service. Notwithstanding that some points of distinction may be drawn between the cited cases (except *Blaski*) and the instant case, it is fair to state that all of these cases contain language which in one way or another supports the power of the Texas Court in the instant matter.

The case most relied upon by respondent is *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111. This case was decided by a court of five judges, two of whom dissented (Judges Hastie and McLaughlin). With due respect to the majority, we agree with the reasoning and logic of the dissenting opinion. The dissent states (page 119):

> "But we do not see how the conduct of a defendant after suit has been instituted can add to the forums where 'it might have been brought.' In the normal meaning of words this language of Section 1404 (a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted."

In agreeing with the dissenting members of that Court, we find ourselves in good company. In *General Electric Co.* v. *Central Transit Warehouse Co. et al.*, 127 F. Supp. 817, Judge Whittaker (then a District Judge, now a Justice of the Supreme Court) also agreed with the dissenting members in the *Paramount Pictures* case. More than that, he analyzed and distinguished that case on its facts. In our view, the opinion by Judge Whittaker is sound. His reasoning and logic is unassailable and we think he reached the correct result. A striking statement in his opinion, referring to the construction, there sought as it is here, of the phrase "where it might have been brought," is (page 826):

> "Would not such construction be to read that phrase entirely out of the statute? Would not such construction permit transfer of the action to *any district desired by the moving defendants*, though they, or some of them, could not have been served with process there, and no statutory venue existed there, and the action could not have been maintained there, without their intentional waiver of venue and entry of general appearance? I think no such treatment can be given to that phrase in the statute. It, says Judge

> Learned Hand, " 'presupposes at least two forums in which the defendant is amenable to process.' " *Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F. 2d 949, 952."

We have read with interest Judge Hoffman's opinion. He makes a fair and detailed analysis of numerous cases. His counsel in this Court stated, "We, as counsel, cannot improve upon the discussion of the law on this subject which was included in Respondent's opinion." We agree that counsel have not improved upon Judge Hoffman's opinion. Among other things he stated:

> "Gentlemen, personally I am of the opinion that the dissent in *Paramount* against *Rodney* is supported by the greater weight of reason and logic and that this Court, if I were to rely on my own personal inclination should retransfer this case to Texas.
>
> "Those cases supporting transfer to this district, I think, do great violence to the established rules of statutory construction.
>
> "They seem to create a doctrine of retroactive waiver in order to reach the conclusion that the action might have been brought."

After having thus reasoned, he concluded:

> "I feel, however, I must follow the law as it appears to me to be established, especially in view of the fact that the Supreme Court has consistently refused to grant certiorari to those cases supporting transfer to this district."

It thus appears that respondent reasoned one way and decided the other. Certainly he had no sound basis for attaching weight to the fact that the Supreme Court has refused to grant certiorari in the cases supporting transfer. See *Agoston* v. *Commonwealth of Pennsylvania*, 340 U.S. 844, 845.

We have heretofore quoted from Judge Whittaker's opinion in *General Electric Co.* v. *Central Transit Warehouse Co. et al.*, 127 F. Supp. 817, which includes a statement from *Foster-Milburn Co.* v. *Knight* (2 Cir.), 181

F. 2d 949, 952, that it (referring to Sec. 1404 (a)) "presupposes at least two forums in which the defendant is amenable to process." This Court, in *Chicago, R.I. and P.R. Co.* v. *Igoe*, 212 F. 2d 378, 379 (footnote), cited with approval the statement from the *Foster-Milburn* case. Numerous District Courts have embraced this view of the transfer section. *Nachtman* v. *Jones & Laughlin Steel Corp.*, 90 F. Supp. 739, 740; *Wilson* v. *K. C. Southern Ry. Co. et al.*, 101 F. Supp. 56; *Johnson* v. *Harris*, 112 F. Supp. 338, 341; *Mitchell* v. *Gundlach*, 136 F. Supp. 169, 172; *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577, 581; *Hill* v. *Upper Mississippi Towing Corp.*, 141 F. Supp. 692, 694; *Gilpin* v. *Wilson*, 148 F. Supp. 493.

In the last cited case, the latest which we find on the subject, the Court after reviewing the case law decided that the transferee district must be one where the action might have been originally brought. In so deciding, the Court stated (page 494):

> "The Court, while recognizing the divergence of authority on this question, is persuaded that a district wherein the action 'might have been brought' infers that the transferee district must be not only a district wherein venue lies and a complaint may be filed, as indeed one may file a complaint at will, but the transferee district must also be one in which the action might have been legally maintained and service of process effected upon the defendant. This view comprises the weight of authority and is represented by well-reasoned decisions from both the Second and Ninth Circuits."

(*Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F. 2d 949, and *Shapiro* v. *Bonanza Hotel Co.*, 9 Cir., 185 F. 2d 777.) The Court in *Gilpin* cites other cases which have expressed the same view, including *Blackmar* v. *Guerre et al.* (5 Cir.), 190 F. 2d 427, 429, wherein the Court stated:

> "Transfer under those sections [1404 (a) and 1406 (a)] is limited to districts where the suit could be originally brought. [Citing cases.]"

In *Ex Parte Collett*, 337 U.S. 55, the Court considered the doctrine of *forum non conveniens* as it relates to Sec. 1404 (a). In that connection, the Court discussed the transfer section together with the venue provision there involved. While the issue in the instant case was not directly involved, we think the reasoning by analogy supports the view that the transferee district must be one where the action could have been properly brought. (See pages 59 and 60.) Counsel for respondent attempt to escape the reasoning of *Collett* on the basis of *Norwood* v. *Kirkpatrick*, 349 U.S. 29, which it is claimed broadened the scope to be awarded Sec. 1404 (a). The suggestion is without merit. *Norwood* had nothing to do with the statutory limitation on the power of a District Court to transfer. The case is concerned solely with the matter of the Court's discretion. The Court stated (page 32):

> "As a consequence, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

For a discussion of the *Norwood* case see *Clayton* v. *Swift & Co.*, 137 F. Supp. 219, 221.

So that there will be no misunderstanding as to our position on the power of a District Court to transfer an action to another district, we refer to a recent opinion of this Court. *General Casualty Co.* v. *Grubb*, 253 F. 2d 51. Unfortunately this case is sometimes cited in support of the thesis that a District Court has the power to transfer to a forum where the action could not have

been originally brought. Whether the issue of power was before the Court in the *Grubb* case the opinion does not disclose. If so, it is evident that the issue was undecided. The case was decided solely on the issue of the District Court's discretion to order the transfer. As the Court stated (page 53):

> "On the other hand, we are appraising discretion exercised under Sec. 1404 by the district court and all we can do is to determine whether the respondent Judge abused it while at the same time, guarding against substituting our discretion for his."

The writ of mandamus is allowed, and respondent is directed to vacate and set aside his order entered March 14, 1958, and to order the action remanded to the United States District Court, Northern District of Texas, Dallas Division.

FINNEGAN, *Circuit Judge*, Dissenting. An opinion in this case, written by me, and in which Judge Major and Judge Schnackenberg joined with me, was handed down July 1, 1958. Now my two colleagues have changed their position, and on rehearing ordered withdrawal of our earlier unanimous opinion. Since I adhere to my original position of refusing the peremptory writ of mandamus in this case, I am explaining my reasons for dissenting.

At the outset, I underscore two items. (1) The record underlying this current majority opinion has remained unchanged since the day when we three judges handed down our first *Blaski* opinion. (2) John F. Blaski, MPH Manufacturing Corporation, Inc., Peter S. Pedersen, Peter S. Pederson, Jr., co-partners d/b/a Central Farm Equipment Company, petitioners here, had earlier, October 3, 1955, sought a writ of mandamus in our Court to expunge Judge Tehan's order transferring their case brought in the Eastern District of Wisconsin against Inland Steel

Products Company, LeRoy Hermann and Robert Anderson, defendants, from the Eastern District of Wisconsin to the Northern District of Illinois for consolidation with other suits then pending in the latter District Court. Those cases involve the same patent as the case at bar. Judge Schnackenberg joined with Judge Lindley in an order, entered October 3, 1955, denying the petition of Blaski, et al. for mandamus. The petition for a writ of mandamus in that case shows Blaski, et al. challenged the power of Judge Tehan to transfer, or in the alternative, claimed the District Judge abused his discretion.

Ex Parte Blaski, 245 F. 2d 737 (5th Cir. 1957) is the Fifth Circuit's opinion denying leave to file a petition for a writ of mandamus to vacate the order entered by the United States District Court in Texas transferring the case at bar to the Northern District of Illinois. Judge Jones, speaking for the Fifth Circuit, when rejecting the petition presented by Blaski, et al., pointed out (245 F. 2d 737):

> "The movants here, who were plaintiffs in the district court, have their *residence* in the Northern District of Illinois. They instituted suit in the district court for the Northern District of Texas against several defendants, all of whom reside in the Northern District of Texas . . . The defendants made a motion to transfer the cause, pursuant to 28 U.S.C.A. § 1404(a), to the Northern District of Illinois. In their motion the defendants stated that their witnesses were much closer to the court in Illinois than to the court in Texas. They also state, among other averments, *that there is pending in the district court for the Northern District of Illinois a consolidated action in which the plaintiffs in the Texas suit were charging* infringement of the *same patent as was involved in the suit in Texas.* It was shown that in the action in the Northern District of Illinois much pre-trial information and evidence had been developed which would

be relevant in the case commenced in the Northern District of Texas. *The defendants waived their right to be sued in the Northern District of Texas and consented to the consolidation of the action with the cause pending in Illinois.* . . . .

"The plaintiffs say that none of the defendants reside in Illinois and have not committed in Illinois any acts of infringement, that process issued in Illinois could not have been served on the defendants and therefore the action could not "have been brought" in the district to which it was transferred. The attempted waiver, the plaintiffs say, is ineffectual." (Italics supplied)

As I understand Judge Major's opinion in this rehearing, he holds that unless there is venue under 28 U.S.C. § 1400 in at least two forums, a trial judge is restrained from basing any order of transfer on 28 U.S.C. § 1404 (a). In reaching that result Judge Major disagrees, as I view it, with the Fifth Circuit that a transfer is proper on motion of a defendant who consents to the transfer (by waiving venue in the transferor court) even though the defendant is not amenable to venue in the transferee court selected by such movant, I doubt if any one would seriously urge that the *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222 (1957) holding precludes all transfers of patent cases when § 1404 (a) is involved, especially after noticing the words "any civil action" used by Congress in § 1404 (a).

Literally speaking, the defendants-litigants in the case before us, "waived their right to be sued in the Northern District of *Texas*" [See 245 F. 2d 737]; they did not, with all deference to Judge Major, waive venue "in a forum in which an action had not been and could not be properly brought by an opposing party."

Venue under 28 U.S.C. § 1400 (b) means only the place where these defendants could require the case to be tried and, as a word "venue" refers neither to jurisdiction nor power to decide the case. Locality of trial is a personal privilege which these defendants could waive. *In Re Josephson*, 218 F. 2d 174, 184-185 (5th Cir. 1954), and cases there collected. Venue for commencing patent suits is predetermined by § 1400 (b), but there is nothing in that section contained preventing the place of trial from being shifted in accordance with the yardsticks of "the convenience of parties and witnesses in the interest of justice," provided by § 1404. These Texas defendants have consented to consolidation of the Texas suit with those long since pending in Illinois.

I think the Fifth Circuit penetrated the problem at hand and soundly concluded that:

> "The rule which to us seems the better reasoned and which has been adopted by the majority of the courts, permits the transfer upon the motion or with the consent of the defendants even though they could not have been served with the process of the transferee court . . ." (245 F. 2d 737, 738).

Judicial discretion came into play after the defendant waived venue in Texas and consented to the consolidation with Illinois pending litigation on the same patents. Rather than abuse of discretion I find the District Judge in Texas displayed some sound practical common sense. Indeed I think the bare words "where it might have been brought" in § 1404 (a), are being used here as an intellectual go-cart just to wheel the case back again to Texas. This case ought to be resolved on its peculiar facts and against the background of lawsuits begun by Blaski, et al. in Wisconsin and Texas. As I have previously said, there

appears to be no legalistic reason just why the respondent judge should overrule the Fifth Circuit. I would deny the petition for writ of mandamus just as I would have struck down a petition in the nature of a writ prohibition, which at least would have been potentially more appropriate.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. [redacted] 26

HONORABLE PHILIP L. SULLIVAN, Chief Judge of the United States District Court for the Northern District of Illinois,

Petitioner,

vs.

OTTO BEHIMER and JOHN A. ROBERTS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 616

HONORABLE PHILIP L. SULLIVAN, Chief Judge of the United States District Court for the Northern District of Illinois,

Petitioner,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF IN OPPOSITION.

OPINIONS BELOW, JURISDICTION, STATUTE INVOLVED AND QUESTION PRESENTED.

The opinions below, jurisdictional requisites, statute involved and the question presented are adequately set forth in the petition.

ARGUMENT.

I.

NO CONFLICT EXISTS WITH OTHER CIRCUITS.

Petitioner cites five cases in circuits other than the Seventh Circuit as holding venue by consent is sufficient to give the transferee court jurisdiction within the meaning of § 1404(a): *Ex Parte Blaski*, 245 F.2d 737 (5 Cir. 1957), cert. denied, 355 U.S. 872; *In Re Josephson*, 218 F.2d 174 (1 Cir. 1954); *Anthony* v. *Kaufman*, 193 F.2d 85 (2 Cir. 1951), cert. denied, 342 U.S. 955; *Torres* v. *Walsh*, 221 F.2d 319 (2 Cir. 1955), cert. denied, 350 U.S. 836; and *Paramount Pictures* v. *Rodney*, 186 F.2d 111 (3 Cir. 1950), cert. denied, 340 U.S. 953.

In each of these cases, except *Ex Parte Blaski*, the court either directly or by implication pointed out the fact that under the venue statute governing the particular case, suit could have been brought, in the first instance, in the transferee district. In *Torres* v. *Walsh*, *supra*, the Second Circuit permitted transfer of two cases saying that in one, the libel could have been brought in Puerto Rico (the transferee district), as a libel against a vessel may be brought in any district where the vessel may be found, and the vessel had been in Puerto Rico from time to time, and the Pennsylvania Railroad could have been sued in Pennsylvania (the transferee district), but that

> ". . . it may not be doubted that the Congress intended no transfer in any case where the transferee Court lacked competence to proceed." p. 321.

In *In Re Josephson*, *supra*, the principle of concurrent jurisdiction is succinctly stated and recognized at page 183:

> "In the present case we understand petitioner to concede, and rightly so, that jurirsdiction of the subject matter, and proper venue, exist both in the federal court for the District of Massachusetts and in the federal court for the District of New Mexico. The two districts have jurisdiction under 28 U.S.C. § 1332 (a) (1) . . ."

In *Anthony* v. *Kaufman, supra,* the court recognized the principle of dual jurisdiction, saying at page 86:

> "If, however, the district judge lacked power to make his order of transfer, we will entertain such a petition. See *Foster-Milburn Co.* v. *Knight,* 2 Cir., 181 F.2d 949. In that case, the defendant, which could not have been served in the transferee district, objected to the transfer, and we issued a mandamus writ. But here, one defendant could have been served in the transferee district . . ."

Paramount Pictures v. *Rodney, supra,* was a suit under the Clayton Act against fourteen defendants, nine of whom were doing business in Texas. The court pointed out that under the provisions of the anti-trust laws, 28 U.S.C. § 1337:

> "Suits embracing the identical subject matter could have been brought and, literally, 'might have been brought', by the plaintiffs against the defendants in any district court in Texas." p. 114.

II.

NO INTRA-CIRCUIT CONFLICT EXISTS.

Petitioner relies upon *General Casualty Co.* v. *Grubb,* 253 F. 2d 51 (7th Cir. 1958), cert. denied, 357 U.S. 907, as showing an intra-circuit conflict. Petitioner interprets that case far differently from the interpretation of the

court itself. The position of the Seventh Circuit and its interpretation of the *Grubb* case is clearly shown in the following quotation from *Blaski* v. *Hoffman*, 260 F. 2d 317, 324:

> "So that there will be no misunderstanding as to our position on the power of a District Court to transfer an action to another district, we refer to a recent opinion of this Court. *General Casualty Co.* v. *Grubb*, 253 F. 2d 51. Unfortunately this case is sometimes cited in support of the thesis that a District Court has the power to transfer to a forum where the action could not have been originally brought. Whether the issue of power was before the Court in the *Grubb* case the opinion does not disclose. If so, it is evident that the issue was undecided. The case was decided solely on the issue of the District Court's discretion to order the transfer."[1]

Rehearing was denied *En Banc* on Nov. 25, 1958 by the Seventh Circuit in the *Blaski* case. No intra-circuit conflict exists.

III.

IMPORTANCE OF QUESTION.

With the exception of *Ex Parte Blaski, supra*, the decisions of the various circuits interpret the clear and explicit phrase of § 1404(a) "where it might have been brought." These decisions reject that phrase as being surplusage and require that the transferee court have jurisdiction under applicable venue statutes with or without the consent of the defendants. This interpretation is clearly correct.

---

[1] The motion to transfer in the Grubb case recited that the action for declaratory judgment could have been brought in the transferee court and the district court discussed venue in the transferee court as being supported by the Oklahoma Non-Resident Motorist Statutes. General Casualty Co. v. Keller, 154 F. Supp. 451, 452 (D.C. Wisc. 1957).

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1959

No. 26

HONORABLE PHILIP L. SULLIVAN, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

vs.

OTTO BEHIMER AND JOHN A. ROBERTS,

Respondents.

BRIEF FOR PETITIONER

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Respondents.

BRIEF FOR PETITIONER

DECISIONS BELOW

The opinion (R. 91-94) and judgment (R. 94-95) of the Court of Appeals for the Seventh Circuit issued November 26, 1958, and is reported at 261 F. 2d 467. No opinion was delivered in the District Court. Petitioner's decision, announced orally from the bench (R. 87), is detailed in his answer to the rule to show cause (R. 83-90).

* At the time certiorari was requested, Petitioner was Chief Judge of his district. Subsequently Petitioner, who reached his seventieth birthday on October 2, 1959, relinquished (on April 6, 1959) his position as Chief Judge, though he still continues in regular active service. See Public Law 85-593, 72 Stat. 497; 28 U.S.C. § 136.

JURISDICTION TO REVIEW

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(1). The petition for certiorari was filed December 31, 1958. Certiorari was granted herein October 12, 1959.

STATUTE INVOLVED

The statute involved in this case is 28 U.S.C. §1404(a), 62 Stat. 937 (1948), which provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

QUESTION PRESENTED

The questioned transfer of this diversity case, a transfer which Petitioner ordered for reasons he felt to be compelling, brings into focus the construction to be given to the clause "where it might have been brought" of Section 1404(a).

Petitioner, acting upon defendants' formal assurances of the entry of their personal appearances and waiver of venue in the transferee forum, ordered the subject action transferred pursuant to Section 1404(a) to the United States District Court for the District of Utah. Since the venue and process of that court had been confirmed by defendants' assurances, and since that court unquestionably had jurisdiction of the subject matter, Petitioner concluded that the action "might have been brought" there at the time he directed its transfer to that forum.

In its narrowest sense the question presented by the facts of this case is whether 28 U.S.C. §1404(a) authorized Petitioner to transfer a civil action for the convenience of

parties and witnesses and in the interest of justice to a district which, having jurisdiction over the subject matter of the action, possessed venue and personal jurisdiction by reason of the defendants' waiver and consent.

More generally phrased, the question is whether (assuming that the circumstances warrant) federal district courts are authorized by Section 1404(a) to transfer a civil action to another district or division of equal power to adjudicate if, after the commencement of the action, the venue and personal jurisdiction of the transferee forum have become perfected by such circumstances as (1) a change in residence of the parties, (2) a plaintiff or defendant corporation's qualification or doing of business in the pertinent State, or (3) a defendant's consent to and acceptance of the venue and process of such forum pursuant to his proposal or that of the plaintiff.

In essence, the issue is simply that of identifying the point in time at which a civil action "might have been brought": Is this time to be measured and the transfer power of federal district courts to be determined at the commencement of the action or at the time of transfer?

STATEMENT OF THE CASE

The present mandamus proceeding grows out of a minority stockholders' suit brought in a representative capacity by two stockholders of a Utah corporation on behalf of themselves and other stockholders of that company who allegedly were similarly situated (R. 8). The other stockholders for whom the two plaintiffs assumed to act were 918 in number, a majority of whom (575) resided in Utah (R. 85). The two plaintiffs were Otto Behimer, a resident of Illinois, and John A. Roberts, a resident of New York (R. 5). The defendants were Standard Oil

Company, an Indiana corporation, and Standard Oil Foundation, Inc., an Indiana charitable corporation, owners respectively of 72.5% and 5.1% of the outstanding stock of the Utah company (R. 5, 6).

The action was filed in the United States District Court for the Northern District of Illinois, a forum which would now be unavailable to the plaintiffs but wherein at that time diversity of citizenship existed.* The requisite amount in controversy was claimed (R. 5). The plaintiffs charged that the sale of the Utah corporation's assets to defendants' newly organized subsidiary, which was authorized to do business in Utah and other western states, was for an inadequate price (R. 33). Defendants, together with 52 other shareholders of the Utah company, were charged with having violated their fiduciary duties (as majority stockholders) to plaintiffs and others similarly situated by permitting the sale to be made at the allegedly inadequate price (R. 8).† The 52 other stockholders who allegedly acted with the defendants were denominated "controlled stockholders" in the complaint (R. 6). With two exceptions, all were residents of Utah (R. 72-75), as were all of the sixteen officers and directors of the Utah corporation (R. 67-68).

---

* Plaintiffs' complaint was filed on February 12, 1958 (R. 5), some five months prior to the amendment (Public Law 85-554), to 28 U.S.C. § 1332 by which "a corporation shall be deemed a citizen of . . . the State where it has its principal place of business." Plaintiffs' counsel states that Standard Oil Company has its principal office in Chicago (R. 78). Taken at its face value, this asserted fact and the Illinois residence of plaintiff Behimer would destroy the diversity jurisdiction. But for the savings clause of the amendment to § 1332, this action would have to be filed elsewhere than in the federal court in Chicago. If filed in the Illinois state courts, the action would be subject to Illinois' *forum non conveniens* rule, *Whitney* v. *Madden*, 400 Ill. 185, 79 N.E. 2d 593 (1948).

† A condition of this sale, which events saw fulfilled, was that it be approved by the affirmative vote of the holders of more than 50% of the outstanding stock of the Utah company other than that stock held by defendants (R. 46, 84).

The substantive charges of the complaint were denied in the answers of the defendants, and on the following day the defendants brought on before Petitioner their motion for a transfer of the action to the United States District Court for the District of Utah, Central Division, pursuant to 28 U.S.C. §1404(a). As part of their motion, defendants formally assured Petitioner that, in the event of the transfer of the suit as requested, their personal appearances would be entered in, and they would waive any legal privilege they might have as to the venue of, the proposed transferee forum (R. 64).

Petitioner, after having considered the transfer motions, the affidavits furnished on behalf of the parties, and the briefs filed with him by counsel, ordered the transfer, which he found to be for the convenience of the parties and witnesses and in the interest of justice (R. 80-81). Present in the case were eight reasons by which Utah was demonstrated to be the appropriate forum, reasons which have been detailed by Petitioner and which, he felt, were compelling of transfer (R. 88, 90).* Among them was the cir-

* Petitioner's determination that a transfer would be "[f]or the convenience of parties and witnesses, in the interest of justice" was based (R. 88-89) upon:

1. The Utah residence of the majority of the class for whom plaintiffs nominated themselves as representatives;
2. The Utah residence of fifty of the "controlled stockholders" and of all sixteen of the officers and directors of the Utah corporation;
3. The location in Salt Lake City of all the books and records of the Utah corporation;
4. The situs of the assets, whose sales price plaintiffs assert was inadequate, in Arizona, Colorado, Idaho, Nevada, Oregon, Utah, Washington and Wyoming;
5. The availability in Utah of the purchasing corporation;
6. The disruption of the business of the purchasing corporation were its officers and directors to attend pre-trial and trial proceedings in Chicago;
7. The circumstance that the substantive law of Utah governs the cause of action; and
8. The comparative calendar conditions of the Chicago and Salt Lake City districts.

cumstance of the Utah residence of a large majority (575) of the class for whom plaintiffs assumed to act, most of which class had affirmatively approved the sale which plaintiffs sought on their behalf to condemn (R. 84). Petitioner in consequence was concerned that the interest of all the members of the class be safeguarded (R. 85), and Petitioner concluded that, given the power to transfer, he would be guilty of an abuse of discretion were he to refuse to exercise that power (R. 86, 90).

Plaintiffs, respondents here, petitioned the Court of Appeals for the Seventh Circuit for a writ of mandamus to compel Petitioner to vacate his transfer order (R. 1-4). That court, without concerning itself with the reasons for the transfer (R. 93), held that Petitioner had no power to make the transfer and entered judgment for the writ of mandamus (R. 95). Because the Seventh Circuit's decision conflicted with the decisions of four other courts of appeal on an important question of federal law, Petitioner sought a writ of certiorari to have the question reviewed by this Court.

SUMMARY OF ARGUMENT

I. It is Petitioner's thesis that 28 U.S.C. §1404(a) is to be construed in such a fashion as to enable the federal district courts to transfer a civil action to another district for the convenience of the parties and witnesses and in the interest of justice if that district is fully available to the parties at the time of transfer. If at such time, any precedent disabilities in the venue and personal jurisdiction of the transferee forum have been obviated, and if at such time the transferee forum has the power to adjudicate the issues of the action, it is a forum in which the action might then have been brought.

A. The text of Section 1404(a) indicates the propriety of this construction, by which the existence of the power to transfer is to be determined as of the time it is to be exercised. Such a construction is grammatically sound and comports with the sense of the section: that trial convenience and the interest of justice are to be determined by what can be accomplished at the time of transfer. Such construction does not make the section's concluding clause meaningless or surplusage.

B. To test the existence of the power to transfer (which is a corollary to the full availability of the more convenient forum) at the time of its exercise is to give Section 1404(a) a scope of action which is at least as broad as that afforded to the courts under the doctrine of *forum non conveniens*, the progenitor of the section. It would be strange indeed if Section 1404(a), which was intended to be remedial and a valuable aid to judicial administration, were to be denied the usefulness which its antecedent possessed and upon which the section was meant to improve. Nothing in the doctrine of *forum non conveniens* commanded that the availability of the more convenient forum be determined at the time suit was commenced; on the contrary *forum non conveniens* courts dismiss in favor of a jurisdiction made available during suit.

II. Petitioner's construction of Section 1404(a) gives full effect to the broad remedial purpose of that statute. The section, being remedial, should not be narrowly construed nor should its utility be curtailed. The choice of transferee forums should be at least as broad as that afforded by the doctrine of *forum non conveniens*. All Courts of Appeal

except the court in the instant case have sustained the transfer power of the federal district courts on the basis of circumstances prevailing at the time of transfer. This is Petitioner's construction and his thesis.

ARGUMENT

I.

THE QUALIFYING CLAUSE OF SECTION 1404(a) REFERS TO DISTRICTS IN WHICH THE ACTION "MIGHT HAVE BEEN BROUGHT" AT THE TIME OF TRANSFER.

The federal district courts, by reason of 28 U.S.C. § 1404(a), have had the authority for the last eleven years to transfer civil actions for the convenience of the parties and witnesses and in the interest of justice. Such authority is unquestionably a valuable aid in judicial administration, obviating as it does the sometimes harsh consequences which a dismissal under the antecedent doctrine of *forum non conveniens* might entail and which a transfer avoids. *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (1955); *Jiffy Lubricator Co.* v. *Stewart-Warner Corporation*, 177 F. 2d 360 (4th Cir. 1949).

Such transfer authority, however, is obviously not unlimited. In the language of the statute which creates the authority, it may be utilized only to direct an action to any other district or division "where it might have been brought." In this respect, the statute finds a counterpart in earlier *forum non conveniens* decisions that require an alternate forum in which plaintiff might proceed if his action be dismissed. Cf. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507 (1947).[1] In granting *forum non conveniens* dis-

[1] "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." 330 U. S. 501, 506-507.

missals, courts have made sure that the alternate "convenient" forum is fully available and have stayed their order or dismissed upon the condition that proper appearances be made or security be filed in that forum, *Canada Malting Co.* v. *Paterson Co.*, 285 U. S. 413, 424 (1932) (libels in admiralty *in personam*), or that appearances be entered and defenses be waived in that forum, *Vargas* v. *A. H. Bull Steamship Co.*, 44 N. J. Super. 536, 131 A. 2d 39, 40, 48 (Law Div. 1957), aff'd. per curiam on opinion below, 25 N. J. 293, 135 A. 2d 857 (1957), cert. denied, 355 U. S. 958 (1958) (personal injury actions under the Jones Act).

Decisions under the predecessor doctrine of *forum non conveniens* are helpful, therefore, in construing the statutory limitation on the exercise of the transfer power conferred by Section 1404(a). They suggest two crucial considerations: First, the convenient—the transferee—forum must be fully available. Second, such availability is to be measured at the time the transfer is directed, and should not be geared to some previous point in time.

In conformity with the first consideration, then, Petitioner assumes that to "bring" an action means something more than to commence it by filing a complaint.[2] It should in Petitioner's view entail the ability not only to file a complaint but to pursue the action to an effective determination on the merits. This means, in short, that the forum should possess (1) jurisdiction over the subject matter of the suit, the "power to adjudicate"[3]; (2) venue; and (3) jurisdiction

[2] Compare *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 114 n. 7 (3rd Cir. 1950), citing *Goldenberg* v. *Murphy*, 108 U.S. 162, 163 (1883), for the thought that "commenced" is synonymous with "brought."

[3] *Neirbo* v. *Bethlehem Corp.*, 308 U. S. 165, 167 (1939).

over the person of the parties.[4] An action may be "brought" —not otherwise—in a forum which possesses these elements. That is an available forum.

In conformity with the second consideration, the availability of the transferee forum should be determined as of the time the transfer power is invoked. As Petitioner views it, if the action might have been brought there at the time of transfer, the power to transfer exists. And if the "convenience of parties and witnesses" and "the interest of justice" so require, the power should be exercised.

The text, the purpose and the background of Section 1404(a) all indicate the propriety of this second consideration and support the validity of the statutory construction suggested above. As for the *background* of the section, its antecedent is the doctrine of *forum non conveniens*,[5] where the availability—in a full and effective sense—of the more convenient forum is determined at the time of dismissal. The *purpose* of the section is remedial,[6] and so construed its benefits accrue not only to defendants, but as well to plaintiffs, whose interest in transfer may be

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[4] Compare *In re Josephson*, 218 F. 2d 174, 185 (1st Cir. 1954), where Chief Judge Magruder indicated that service of process, once effected in the transferor forum, becomes superfluous in the receiving forum.

[5] The Reviser's Notes to Section 1404(a) state that that statute was "drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though venue is proper."

[6] Ex parte Collett, 337 U.S. 55, 71 (1949).

equally if not more keen.[7] Finally, Petitioner's construction is the one indicated by the *text* of the statute itself.

A. Petitioner's Construction Is In Accordance With The Text Of Section 1404(a).

If, as Petitioner assumes, his power to transfer is dependent upon the full availability of the more convenient forum —one which possesses venue and jurisdiction both of subject matter and of parties—when is this availability to be determined? It is Petitioner's belief, and the construction which he respectfully submits to this Court, that the existence of his power to transfer is to be determined as at the time he exercises it.

1. Such Construction Is Grammatically Proper.

Grammatically speaking, Petitioner's construction accords with the tense (the pluperfect) and the mood (the subjunctive) of the clause "where it might have been

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[7] There are numerous reported instances of Section 1404(a) transfer motions by plaintiffs. E.g., *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (9th Cir. 1950); *Gilpin* v. *Wilson*, 148 F. Supp. 493 (M.D. Ala. 1957); *Anschell* v. *Sackheim*, 145 F. Supp. 447 (D. N. J. 1956); *Mitchell* v. *Gundlach*, 136 F. Supp. 169 (D. Md. 1955); *Rogers* v. *Halford*, 107 F. Supp. 295 (E. D. Wis. 1952); *United States* v. *Reid*, 104 F. Supp. 260 (E. D. Ark. 1952); *Herzog* v. *Central Steel Tube Co.*, 98 F. Supp. 607 (S. D. Iowa, 1951); *Otto* v. *Hirl*, 89 F. Supp. 72 (S. D. Iowa, 1950); *McCarley* v. *Foster-Milburn Co.*, 89 F. Supp. 643 (W.D. N.Y. 1950), mandamus indicated, sub nomine *Foster-Milburn* v. *Knight*, 181 F. 2d 949 (2d Cir. 1950). The case last-cited, for example, was a wrongful death action by a California administrator against the manufacturer and distributor of a bottled substance that allegedly caused the decedent's death. After instituting suit in the Western District of New York, where defendants were amenable to service of process, plaintiff moved to transfer the action to California, that being the state of his residence, where the decedent had lived, where the consumption of the bottled material occurred, where the death took place, and where the witnesses resided.

brought." The phrase "might have been" obviously speaks of a potential measured against circumstances prevailing at a certain point in time. If this be an accurate grammatical analysis, the point in time at which the governing circumstances are to be ascertained may as properly be the time of transfer as some precedent occurrence such as the commencement of the action. Section 1404(a), in other words, may as correctly be read in terms of "where it might (then) have been brought" as in terms of "where it might (originally) have been brought." In substance, this is precisely what Chief Judge Biggs meant when, after an *en banc* consideration, he wrote in *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 114 (3rd Cir. 1950):

> "... [t]he difference between the phrase 'might have been brought' of Section 1404(a) and that employed in this opinion, 'could now be brought,' is no more than one of tense and grammar, the imperfect subjunctive as compared to the pluperfect subjunctive. Surely Congress did not intend the effect of an important remedial statute to turn upon tense or a rule of grammar."

In either case, according to Judge Biggs, if the events had occurred at the time of transfer which would make the more convenient forum available (in *Paramount*, the waiver of the venue privilege accomplished this), then the phrase "might have been" of Section 1404(a) was satisfied.

Perhaps more to the point, the existence of the power to transfer should be determined as at the time the power is exercised rather than at some precedent point in time when, in the interval, circumstances might have changed either to conform or to conflict with the requirement for the full availability of the more convenient forum. If in the interval between suit and transfer a forum becomes unavailable—

as by the withdrawal from it of diversity jurisdiction[8]—the venue provision in Section 1404(a) should not be grammatically interpreted as preserving the otherwise terminated subject matter jurisdiction of the transferee forum.

Stated otherwise, a plaintiff in a diversity case may wish to transfer to a district to which he or defendant has moved since the filing of the action, or oppose a transfer to a district formerly but no longer proper. Should not the former be permitted, and should not the latter be denied? The power to transfer should not be geared to antecedent circumstances now changed. Petitioner respectfully submits that if a federal district court "may transfer" a case to another district "where it might have been brought," the determinative point from which the then antecedent availability of the more convenient forum is to be viewed is, grammatically speaking, the time of transfer.

2. Such Construction Comports With The Sense Of Section 1404(a).

Petitioner suggests that the federal district judge, when considering the utilization of Section 1404(a), must determine the matter of convenience and the interest of justice as at the time of transfer and not by reference to some precedent time. The residence of parties and witnesses do change, and what once was in the interest of justice may not now be. If this be true—and assuredly no one disputes this—then should not the existence of the transfer power be measured contemporaneously with the factors upon

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[8] An illustration of such a situation is suggested by the amendment of July 25, 1958 to 28 U.S.C. § 1332. If Petitioner is correct in his construction, transfer of a diversity case to a State wherein plaintiff resides and where defendant has its principal place of business, would, after that amendment, be improper.

which its exercise depends, specifically at the time transfer is to be directed or denied?

This suggestion of a harmonious contemporaneity in the construction of Section 1404(a) has been aptly stated in *Vargas* v. *A. H. Bull Steamship Co.*, 44 N. J. Super. 536, 131 A. 2d 39, 46 (Law Div. 1957):

> ". . . In other words, the federal courts hold that the 'convenience of parties and witnesses' and 'interest of justice' are to be determined by what can now be accomplished, not by what might have been."

This quotation suggests the analogy to be found in those cases which have applied the present power to transfer under Section 1404(a) to actions brought prior to the existence of the power. *Ex parte Collett*, 337 U. S. 55 (1949); *United States* v. *National City Lines*, 337 U. S. 78 (1949).[9] The Court found nothing improper in applying this remedial provision to pending actions. *Ex parte Collett*, 337 U. S. 55, 71 (1949).

3. Such Construction Does Not Make Surplusage Of The Concluding Clause Of Section 1404(a).

The Seventh Circuit in *Blaski* v. *Hoffman*, 260 F. 2d 317, (No. 25 this Term), on the authority of which the instant case was decided, has felt that the clause "where it might

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[9] It is of interest to note that in the National City Lines case, several defendants—as to whom venue might not be proper in the federal district court in Chicago—had stipulated in the federal court in California that they would not raise the question of whether—in the event of a *forum non conveniens* dismissal— the Chicago forum would be a proper venue as to all defendants under Section 5 of the Sherman Act, which controlled venue in that case. 7 F.R.D. 456, 466. This same stipulation was before the California court in the subsequent transfer phase of that case, 80 F. Supp. 734, 743, and apparently satisfied that court that the action had become properly transferable. Its transfer was approved in 337 U. S. 78, though the question of such a post-complaint waiver of venue was not argued to this Court.

have been brought" would become mere surplusage if transfer were to be authorized by a post-complaint satisfaction of the venue and process requirements of the transferee forum. In such event, that court stated, the clause would be meaningless and "[t]he transfer provision would be complete absent the phrase of limitation." 260 F. 2d 317, 320.

In stating this view, the Seventh Circuit repeats an argument which Judge Hastie set forth in his dissent in the *Paramount Pictures* case,[10] and which several thoughtful district courts have noted and accepted.[11]

But this argument overlooks the circumstance that the transferee forum must be one which, in addition to venue and process, has jurisdiction over the subject matter of the action, "the power to decide the issues in the suit."[12] Section 1404(a) does not enlarge or diminish this power, which must exist in the transferee forum independently of Section 1404(a) and of the consent of the parties.[13] The presence of this consideration, then, gives substantial content to the concluding clause of Section 1404(a). By reason of its inclusion an action may not be transferred to a forum which at the time of transfer lacks the power to adjudicate because of some constitutional infirmity or absence of statutory

[10] *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 116, (3rd Cir. 1950) (dissenting opinion), cert. denied, 340 U. S. 953 (1951).

[11] *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817, 826 (W.D. Mo. 1955); *Felchlin* v. *American Smelting and Refining Co.*, 136 F. Supp. 577, 580-581 (S. D. Calif. 1955).

[12] *Mississippi Publishing Co.* v. *Murphree*, 326 U. S. 438, 445 (1946).

[13] A civil action may be brought only in those federal district courts which are constitutionally empowered and statutorily permitted to hear and determine the issues in suit. While venue and personal jurisdiction, being matters of personal privilege, may be satisfied by consent, the "lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties . . ." *United States* v. *Griffin*, 303 U.S. 226, 229 (1938).

authorization. Consequently, the concluding clause of Section 1404(a) does not become surplusage and is not rendered meaningless by the post-complaint satisfaction of the venue and process requirements of the transferee forum.

A number of transfer cases implicitly recognize this. They fall into four groups.

First, actions to condemn adulterated articles may not be transferred to a district where the articles are not located. Because 21 U.S.C. § 334(a) gives the jurisdiction to condemn only to the district court within whose jurisdiction the articles are found, the action cannot be transferred outside that district, since the transferee forum would not be a forum where the condemnation "might have been brought." *Fettig Canning Co.* v. *Steckler*, 188 F. 2d 715 (7th Cir. 1951), cert. denied, 341 U.S. 951 (1951) (the consent of the parties to the transferee forum held to be without effect); *Clinton Foods* v. *United States*, 188 F. 2d 289 (4th Cir. 1951), cert. denied, 342 U.S. 825 (1951); *United States* v. 23 *Gross Jars, Etc.*, 86 F. Supp. 824 (N.D. Ohio, 1949); *United States* v. *91 Packages*, 93 F. Supp. 763 (D. N. J. 1950); *United States* v. *11 Cases, Ido-Pheno-Chon*, 94 F. Supp. 925 (D. Ore. 1950).[14]

Second, because a federal court has no jurisdiction over a local action (ejectment, trespass, etc.) involving real property outside its territorial limits, *Ellenwood* v. *Marietta Chair Co.*, 158 U.S. 105 (1895); *Pasos* v. *Pan American*

[14] The transfer of admiralty actions *in rem* finds no adverse precedent in these food and drug proceedings. Federal district courts have general admiralty jurisdiction (U. S. Constitution, Art. III, Sec. 2), while the statute under which the condemnation of adulterated articles is authorized specifically limits such actions to the one district in which the articles are found. *Torres* v. *Steamship Rosario*, 125 F. Supp. 496, 497 (S.D. N.Y. 1954), mandamus denied *sub nomine Torres* v. *Walsh*, 221 F. 2d 319 (2d Cir. 1955), cert. denied, 350 U.S. 836 (1955).

Airways, 229 F. 2d 271 (2d Cir. 1956), the limitation of Section 1404(a) transfers to districts where the action "might have been brought" precludes transfer of a local action to a district in which the realty is not located. *Arvidson* v. *Reynolds Metals Co.*, 107 F. Supp. 51 (W.D. Wash. 1952); *United States* v. *11 Cases, Ido-Pheno-Chon*, 94 F. Supp. 925, 926-927 (D. Ore. 1950) (dicta).

Third, the concluding clause of Section 1404(a) prevents the transfer of a diversity case to a district where the parties would have to be aligned in such a manner that no diversity jurisdiction would exist. *Masterpiece Productions* v. *United Artists Corp.*, 90 F. Supp. 750 (E. D. Pa. 1950); *Lucas* v. *New York Central R. Co.*, 88 F. Supp. 536, 537 (S.D. N.Y. 1950).

Fourth, although not strictly a case of subject matter jurisdiction, the concluding clause of Section 1404(a) will preclude the transfer of a diversity case to a district in a State where plaintiff is forbidden from bringing suit by the State's rule against actions by non-resident executors. *Felchlin* v. *American Smelting and Refining Co.*, 136 F. Supp. 577 (S.D. Calif. 1955).

The foregoing authorities adequately demonstrate that the phrase "where it might have been brought" is not made meaningless or "surplusage" when it is construed to prohibit transfers to districts where the parties cannot adjudicate their dispute because of the lack of subject matter jurisdiction.

B. Petitioner's Construction Is Consistent With The Forum Non Conveniens Background Of Section 1404(a)

Equally misplaced as a basis for concluding that Section 1404(a) does not permit transfer to a forum where venue

or personal jurisdiction is satisfied by some post-complaint event is the reliance the courts have placed on *Gulf Oil's* [15] statement that *forum non conveniens* "presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." [16]

A careful reading of the *Gulf Oil* opinion against the history of the *forum non conveniens* doctrine to which it referred discloses unambiguously that what the Court meant by this passage was that an alternate forum must exist *at the time the Court grants the motion to dismiss.* In other words, in dismissing an action for *forum non conveniens* the court must not leave the plaintiff remediless. In applying the doctrine of *forum non conveniens* the courts of this country do not seem to consider whether a plaintiff had a choice of forums in which to bring his action *originally.* They do consider whether there is *now* an alternate forum in which plaintiff might proceed if his action is dismissed.[17] In instances where the interest of justice and the convenience of parties and witnesses demand trial in a forum in which defendant is not subject to service, the action is dismissed or stayed on the condition that defendant agree to enter a general appearance in the convenient forum.

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[15] *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507 (1947).

[16] E.g., see *Blaski v. Hoffman*, 260 F. 2d 317, 322-323 (7th Cir. 1958), cert. granted, 359 U.S. 904 (1959); *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 118 n. 6 (3rd Cir. 1950) (dissent), cert. denied, 340 U.S. 953 (1951); *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817, 824 (W.D. Mo. 1955).

[17] Compare the statement in *Re Josephson*, 218 F. 2d 174, 185 (1st Cir. 1954), that a transfer would not be ordered to a district where certain defendants could not be served with process before the transferor court had obtained personal jurisdiction over such defendants; such a prior transfer would not be "in the interest of justice." The same thought is expressed in *Continental Grain Co.* v. *Federal Barge Lines, Inc.*, 268 F. 2d 240, 244 (5th Cir. 1959), cert. granted, No. 229, 1959 Term. The Fifth Circuit there required, as a condition precedent to transfer of that admiralty case, that a claim be filed and the vessel released under bond.

The conditions being satisfied, the time of final dismissal then is determinative of the availability of the alternate, or more convenient, forum in which the action might then have been brought.

The conditional dismissal is a well recognized and approved incident of the doctrine of *forum non conveniens*, being discussed in leading articles on the subject.[18] Cases illustrating this principle are legion. Justice Brandeis' leading *forum non conveniens* opinion, *Canada Malting Co.* v. *Paterson Co.*, 285 U.S. 413 (1932), for example, approved the dismissal of a libel between Canadian parties on the condition (p. 424) "that the respondent should appear and file security in any action which might be instituted by the petitioners in the admiralty courts of Canada, so that petitioners would not by dismissal of the libels lose the security gained by the foreign attachment." This power to grant a *forum non conveniens* dismissal on such conditions has been recently reaffirmed, and its propriety endorsed. *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684, 697-698 (1950).[19]

Of parallel force, and of pertinence to the present controversy, are the decisions where courts have granted *forum non conveniens* dismissals on the condition that defendants appear and consent to service in the more convenient forum when it is clear that plaintiff could not have brought suit there in the first instance. Such cases include:

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[18] Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 908 (1947); Barrett, The Doctrine of Forum Non Conveniens, 35 Calif. L. Rev. 380 (1948).

[19] Other *forum non conveniens* dismissals, on condition defendant post security or waive a defense of statute of limitations, include *Bulkley, Dunton Paper Co.* v. *The Re Salado*, 67 F. Supp. 115 (S.D.N.Y. 1946); *St. Paul Fire & Marine Ins. Co.* v. *The Republica de Venezuela*, 105 F. Supp. 272 (S.D.N.Y. 1952); *Schwartz* v. *Zim Israel Nav. Co.*, 181 N.Y.S. 2d 283 (Sup. Ct. 1958).

a. Federal courts: *The City of Agra*, 35 F. Supp. 351 (S.D.N.Y. 1940); *Libby, McNeill & Libby* v. *Bristol City Line of S.S.*, 41 F. Supp. 386 (S.D.N.Y. 1941); *Galban Lobo Trading Co* v. *The Diponegoro*, 108 F. Supp. 741 (S.D.N.Y. 1952); *Anglo-American Grain Co., Ltd.* v. *S/T Mina D'Amico*, 169 F. Supp. 908 (E.D. Va. 1959); *Giatilis* v. *The Darnie*, 171 F. Supp. 751 (D. Md. 1959).

b. New York courts:[20] *Wendel* v. *Hoffman*, 259 App. Div. 732, 18 N.Y.S. 2d 96 (1940); *Strassburger* v. *Singer Mfg. Co.*, 263 App. Div. 518, 33 N.Y.S. 2d 424 (1942); *Villegas de Jesus* v. *Waterman Steamship Co.*, 286 App. Div. 804, 143 N.Y.S. 2d 618 (1955); *Rodriguez* v. *A. H. Bull Steamship Co.*, 286 App. Div. 804, 143 N.Y.S. 2d 618 (1955); *Ivy* v. *Stoddard*, 147 N.Y.S. 2d 469 (Sup. Ct. 1955).

c. New Jersey courts: *Vargas* v. *A. H. Bull Steamship Co.*, 44 N.J. Super. 536, 131 A. 2d 39 (Law Div. 1957), aff'd. per curiam on opinion below, 25 N. J. 293, 135 A. 2d 857 (1957), cert. denied, 355 U.S. 958 (1958).

Typical of the above case is the *Vargas* decision, involving a seaman's action under the Jones Act (46 U.S.C. § 688) for injuries sustained on defendant's vessel while it was in Puerto Rico. As the defendant (a New Jersey corporation) was not subject to service in Puerto Rico, the action was commenced in the New Jersey state court.

Citing the location of the accident, residence of witnesses, language difficulties, and like considerations, defendants moved for dismissal under *forum non conveniens*, pledging themselves to appear in any action thereafter commenced in Puerto Rico. Plaintiffs resisted, urging the

[20] It is significant that these authorities include no less than four decisions by the appellate courts of New York, a State which has long been a leading jurisdiction in the formulation and application of *forum non conveniens*. Barrett, The Doctrine of Forum Non Conveniens, 35 Calif. L. Rev. 380, 404 (1947).

Gulf Oil "two forums" statement for their proposition that "the doctrine of *forum non conveniens* may be applied only when plaintiff had a choice of forums when he started suit . . . "[21] The court, however, finding no authority which supported this argument, declined to limit the doctrine in such a fashion, adopting rather the thought that "the dispositive consideration" is where trial will "best serve the convenience of the parties and the ends of justice."[22] Upon this consideration, the court dismissed the suit upon the condition that defendant enter a general appearance in a timely action in Puerto Rico, waiving any limitation defenses and reimbursing plaintiffs for their out-of-pocket costs and counsel fees involved in commencing action in New Jersey.

On appeal, the New Jersey Supreme Court unanimously affirmed that opinion, 25 N.J. 293, 135 A. 2d 857, and this Court denied certiorari to the contention that a State court lacked power to enter a *forum non conveniens* dismissal of a federally created cause of action (the Jones Act) brought in the only jurisdiction where *in personam* service of process could originally have been obtained, 355 U.S. 958 (1958).[23]

It is of more than passing interest that the statutory criteria for transfer prescribed by Section 1404(a) is pitched upon the same "dispositive consideration" noted in the Vargas case: the convenience of the parties and witnesses and the interest of justice. Since Congress impressed on Section 1404(a) the same indicia of discretion as formulated and used by *forum non conveniens* courts (which use conditional dismissals to route cases to forums where plaintiff

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[21] 131 A. 2d at p. 40.

[22] 131 A. 2d at p. 43.

[23] Petition for Certiorari, *Vargas* v. *A. H. Bull Steamship Co.*, No. 773, 1957 Term, p. 3 *et seq.*

was not free to maintain his action in the first instance), it seems unlikely that Congress meant for the transferring court's choice of forums to be less flexible than the choice available under the *forum non conveniens* antecedent of that provision.[24]

The background of Section 1404(a), in other words, comports with Petitioner's construction of it: that if, at the time transfer is considered the more convenient forum is available, the section's remedial provision should be capable of utilization. Certainly, if considerations of convenience and justice are better served by the use of another forum offered and made available by defendant, plaintiff should have no standing to object.[25] Such an offer "will not give the defendants a right to choose their forum, a privilege heretofore exercised at least to some degree by plaintiffs. On the contrary [such an offer] puts in the hands of an impartial federal tribunal the determination as to where the suits can best be tried."[26]

In short, there is nothing in the text or background of the statute which directs that the time when an action "might have been brought" must be determined by reference to prelitigation conditions. To the contrary, both text and background support Petitioner's construction of Section 1404(a), as does the remedial purpose of that section.

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[24] Had plaintiffs filed suit in the Illinois state courts (see n. p. 4), it is quite possible that Illinois, through its *forum non conveniens* doctrine, would have routed the litigation in the interest of justice to Utah via a conditional dismissal and thus accomplish that which the Seventh Circuit, in this diversity case, has forbidden of Petitioner.

[25] See Note, 60 Yale L. J. 183, 185 (1951).

[26] *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 116 (3rd Cir. 1950).

II.

PETITIONER'S CONSTRUCTION GIVES FULL EFFECT TO THE BROAD REMEDIAL PURPOSE OF SECTION 1404(a)

A. Section 1404(a) Is A Remedial Statute That Should Not Be Interpreted Or Applied In A Narrow Or Grudging Manner.

It is axiomatic that remedial legislation must be given a liberal construction, and "must not be interpreted or applied in a narrow, grudging manner." *Tennessee Coal Co.* v. *Muscoda Local*, 321 U.S. 590, 597 (1944); *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 26 (1957); *Heitler* v. *United States*, 260 U.S. 438, 440 (1923); *Guardian Trust Co.* v. *Fisher*, 200 U.S. 57, 69, 70 (1906).

Section 1404(a) is unquestionably a remedial statute. It has repeatedly been so recognized and applied. "Clearly," this Court declared in one leading case, "§ 1404(a) is a remedial provision . . ." *Ex parte Collett*, 337 U.S. 55, 71 (1949).

The liberal construction appropriate for remedial enactments has been specifically applied to Section 1404(a), *first*, in holding the section applicable retroactively to actions pending at the time of its enactment, *Ex parte Collett*, 337 U.S. 55 (1949); *second*, in holding the section applicable to actions governed by special venue statutes, such as actions under the Antitrust and Federal Employers Liability Acts, *United States* v. *National City Lines*, 337 U.S. 78 (1949); *Ex parte Collett*, 337 U.S. 55 (1949); and *third*, in holding that the section "intended to permit courts to grant transfers upon a lesser showing of inconvenience" than the antecedent doctrine of *forum non conveniens*, *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32 (1955). In the last-cited case this Court quoted with approval a statement by Chief Judge John Parker, Judicial Consultant

to the Advisory Committee and one of the principal authorities on the Judicial Code, who declared: "It is perfectly clear that the purpose of this section of the Revised Judicial Code was *to grant broadly the power of transfer* for the convenience of parties and witnesses, in the interest of justice . . ."[27] (emphasis supplied)

B. Unless The Transfer Power Is Determined From Circumstances Existing At The Time Of Transfer, The Utility Of This Remedial Provision Will Be Severely Curtailed.

The Seventh Circuit's holding that the power of transfer under Section 1404(a) is to be determined by circumstances existing at the time the action is commenced severely curtails the utility of this remedial provision. In fact, the applicable venue statutes governing a majority of the civil suits filed in federal courts are sufficiently restrictive that unless the transfer power is determined with respect to events prevailing at the time of transfer there will be large numbers of cases where the district court is without power to transfer to the district or division where, "for the convenience of parties and witnesses, in the interest of justice," the action ought to be tried.

Diversity of citizenship cases, which comprise a majority of the civil actions filed in the federal courts,[28] furnish an outstanding example of the need for the hospitable construction of Section 1404(a) for which Petitioner contends. The proper venue in diversity actions is the district "where all plaintiffs or all defendants reside." 28 U.S.C. § 1391(a).

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[27] *Jiffy Lubricator Co.* v. *Stewart-Warner Corp.*, 177 F. 2d 360, 362 (4th Cir. 1949), cert. denied, 338 U.S. 947 (1950).

[28] In fiscal 1958 diversity cases accounted for more than 56% of the 45,675 private civil cases commenced in the United States district courts. Annual Report of the Director of the Administrative Office of the United States Courts, 1958, p. 162-63 (henceforth cited "Report of the Administrative Office, 1958").

If the decision below is to prevail, this venue statute would effectively confine the power of transfer in a case involving an individual or a small corporation[29] to one other forum at most. An action could be transferred from the district where all plaintiffs resided to the district where all defendants resided, or *vice versa*. Where all the plaintiffs or all the defendants did not reside in a single district, so that there was only one district where the action could have been commenced, no transfer could be had. Similarly, there could be no transfer if any defendant was not subject to service of process in the plaintiff's state of residence (so that defendant's district was the only feasible venue).

The instances cited above are more than hypothetical forecasts. They would, if the court below be right, represent serious inroads on the broad power of transfer Congress established "for the convenience of parties and witnesses, in the interest of justice. . . ."

This is illustrated by the fact that a relatively high proportion of diversity cases require a transfer to another district. Of the 4,757 contested diversity cases[30] disposed of in fiscal 1958, over 5% (241 in number) were cases in which the interest of justice and the convenience of parties and witnesses required and the judge ordered a transfer.[31] The type of circumstances involved may be illustrated by an example. Over 73% of the transfers mentioned above (177 in number) involved personal injury tort actions.[32] In such cases the situs of injury (the jurisdiction where the wit-

[29] By this is meant a corporation that is incorporated, licensed, and doing business in but a single state so that it does not have a "residence" in more than one state under 28 U.S.C. § 1391(c).

[30] Excludes cases disposed of by consent dismissals or judgments, by default judgments, or by dismissals for want of prosecution.

[31] Report of the Administrative Office, 1958, p. 170.

[32] Id., at 171.

nesses ordinarily reside and whose substantive law ordinarily prevails) frequently is not the jurisdiction where all the plaintiffs or all the defendants reside. E.g., *General Casualty Co.* v. *Keller*, 154 F.Supp. 451 (E.D. Wis. 1957) (transfer granted), mandamus denied, *General Casualty Co.* v. *Grubb*, 253 F.2d 51 (7th Cir. 1958), cert. denied, 357 U.S. 907 (1958). Unless Section 1404(a) permits transfer to a district where venue is perfected by some event fulfilled by the time the transfer is sought (such as defendant's express waiver), the district judge in such diversity cases will be powerless to transfer to the district where the trial can most conveniently and fairly be held.

The stultifying effect of the Seventh Circuit's construction of course is not limited to diversity cases. In the usual "federal question" case, where venue is only proper in the district "where all defendants reside," 28 U.S.C. § 1391(b), there could be no Section 1404(a) transfer where any defendant was an individual or a company incorporated, licensed, and doing business in a single state, since venue in the first instance would only be proper in a single forum. Similarly, if such a defendant were sued in a patent infringement case (venue under 28 U.S.C. § 1400(b)), a Section 1404(a) transfer could only be had if the defendant resided in a different district than that in which he had committed acts of infringement and had a regular and established place of business.

Other examples could, but need not, be recounted. It is obvious that the Seventh Circuit's interpretation severely limits or altogether eliminates the remedy of transfer in a great number of cases where it is appropriate and where it is even now, at least in the four Circuits sustaining the transfer power in circumstances like the instant case, being exercised. In contrast if, as Petitioner contends, the power

of transfer is determined from circumstances existing at the time of transfer the full remedial effect of that provision may be realized.

C. Unless The Transfer Power Is Determined From Circumstances Existing At The Time Of Transfer, A Court Applying This Remedial Provision Will Be Restricted To A Narrower Choice Of Transferee Forums Than It Enjoyed In Dismissing Under The Antecedent Doctrine Of Forum Non Conveniens.

Petitioner has already noted how the Reviser's Notes declare that Section 1404(a) "was drafted in accordance with the doctrine of *forum non conveniens* . . ." [33] It has been pointed out how, under that doctrine, the existence of the alternate "convenient" forum was determined as of the time of dismissal, with dismissals frequently being conditioned on the defendant's appearing and waiving defenses in the selected forum. Thus, under the doctrine of *forum non conveniens* the court enjoyed a relatively broad choice of forums in whose favor the action could be dismissed and to which the parties could be remitted in the interest of justice.

Considering the broad remedial purpose of Section 1404(a), it is highly unlikely that it was meant to reduce this broad choice. On the contrary, whenever this court has had occasion to rule on the matter it has held that Section 1404(a) was a procedural innovation more liberal than its forerunner. So, as noted above, the transfer power applies to FELA and Antitrust cases, to which *forum non conveniens* was inapplicable.[34] Likewise, as compared with

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[33] Reviser's Notes following 28 U.S.C. § 1404.

[34] *Ex parte Collett*, 337 U.S. 55 (1949); *United States* v. *National City Lines*, 337 U.S. 78 (1949). Compare *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U.S. 44 (1944); *United States* v. *National City Lines*, 334 U.S. 573 (1948).

forum non conveniens, Section 1404(a) "intended to permit courts to grant transfers upon a lesser showing of inconvenience," [35] because of the enlarged remedy of transfer in lieu of dismissal. In view of the remedial purpose of this statute, its increased applicability, enlarged remedy, and less stringent standards for the exercise of discretion as compared with the antecedent doctrine of *forum non conveniens*, Petitioner can only conclude that Congress at least meant to preserve the choice of forums available under that doctrine. That can only be accomplished by the construction Petitioner advocates, determining the transfer power according to circumstances prevailing at the time of transfer. In that manner the flexibility and utility of the antecedent doctrine may be retained.

D. Petitioner's Remedial Interpretation Of Section 1404(a) Is That Adopted By An Overwhelming Majority Of Courts Of Appeals That Have Considered The Matter.

An overwhelming majority of Courts of Appeal that have considered the matter have sustained the power of transfer on the basis of the circumstances prevailing at the time transfer is ordered.[36] Their decisions are:

1. **First Circuit** (unanimous decision). *In re Josephson*, 218 F. 2d 174 (1954).

2. **Second Circuit** (unanimous decisions). *Anthony* v. *Kaufman*, 193 F. 2d 85 (1951), cert. denied, 342 U. S. 955 (1952); *Torres* v. *Walsh*, 221 F. 2d 319 (1955), cert. denied, 350 U. S. 836 (1955).

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[35] *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32 (1955).

[36] Apparently the only Court of Appeals to the contrary is the Seventh Circuit in the instant case and its companion case, *Blaski* v. *Hoffman*, 260 F. 2d 317 (7th Cir. 1958), cert. granted, No. 25, 1958 Term.

3. **Third Circuit** (5-2 decision). *Paramount Pictures* v. *Rodney*, 186 F. 2d 111 (1950), cert. denied, 340 U. S. 953 (1951).

4. **Fifth Circuit** (unanimous decision). *Ex parte Blaski*, 245 F. 2d 737 (1957), cert. denied, 355 U. S. 872 (1957).

5. **Seventh Circuit** (unanimous decision). *General Casualty Co.* v. *Grubb*, 253 F. 2d 51 (1958), cert. denied, 357 U. S. 907 (1958).

In so ruling these Courts have specifically relied on the remedial purpose of Section 1404(a). For example in *Ex parte Blaski*, 245 F. 2d 737, 738, (5th Cir. 1957), cert. denied 355 U. S. 872, the Fifth Circuit observed:

> ". . . The purposes for which § 1404(a) was enacted would be unduly circumscribed if a transfer could not be made in the 'interest of justice' to a district where the defendants not only waive venue but to which they seek the transfer."

To the same effect was Chief Judge Magruder's reasoning in *In re Josephson*, 218 F. 2d 174, 184 (1st Cir. 1954):

> ". . . Reading § 1404(a) in the light of this settled doctrine [that venue requirements might be waived], it seems to us altogether proper to hold that a case may be transferred to a district not having statutory venue provided the defendant or defendants for whose benefit the venue privilege is conferred agree to waive the same. *Such an interpretation indeed is to be favored, since it tends to enhance the usefulness of this important provision for administrative transfer of cases in the interest of convenience and justice.*" (emphasis supplied)

CONCLUSION

Accordingly, Petitioner's construction is not only supported by the express language of the statute, reinforced by its remedial purpose and the antecedent doctrine of *forum non conveniens*, but it also enjoys the weight of authority.

For the reasons set forth, Petitioner believes that the Court of Appeals for the Seventh Circuit erroneously construed the extent of the authority accorded to Petitioner under 28 U.S.C. § 1404(a) and improperly issued its writ of mandamus directed to him. Petitioner respectfully suggests that this action by the Seventh Circuit should be set aside.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 26

HONORABLE PHILIP L. SULLIVAN, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

vs.

OTTO BEHIMER AND JOHN A. ROBERTS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED.

The "Question Presented", as stated in the Brief for Petitioner oversimplifies the issues in this cause and ignores certain of the contentions made by Respondents in the District Court and in the Court of Appeals.

It is respectfully submitted that the "Questions Presented" are as follows:

(1) Whether a District Court, having proper venue and jurisdiction over Defendants is a minority stock-

holders' suit, has the power under Section 1404(a), Title 28, USCA to transfer the cause on motion of the Defendants to a district where suit could not originally have been brought by the Respondents?

(2) If such power does exist, was the power exercised prematurely?

(3) Did the Respondent properly exercise his discretion?

DECISION BELOW.

The United States Court of Appeals for the Seventh Circuit in this case (R. 91-94) and in the case of *Blaski* v. *Hoffman*; now before this Court *sub nomine Hoffman* v. *Blaski*, No. 25, answered the first Question Presented in the negative. The Court of Appeals found it unnecessary to decide whether the exercise of discretion was proper (R. 93).

THE STATUTORY SECTION UNDER WHICH TRANSFER OF THIS CASE WAS SOUGHT.

Section 1404(a), Title 28 USC, is the statutory section under which transfer was sought in this case. It provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.*"*

---

* Emphasis added throughout this brief unless otherwise indicated.

STATEMENT OF THE CASE.

These facts must be added to Petitioner's Statement of the Case: The Record discloses the following material pleadings:

(1) The Defendants in the District Court, Standard Oil Company and Standard Oil Foundation, Inc., each filed Motions to Dismiss (R. 23, 54); these Motions to Dismiss were not decided prior to the Order of Transfer.

(2) The Affidavit in Support of the Motion for Transfer (R. 65-75) does not disclose the name of a single witness who would testify for Defendants or the location of a single document that would be presented in evidence.

SUMMARY OF ARGUMENT.

I. Respondents contend that the trial judge does not have the power to transfer a civil action to another district if the transferee district is not one where the action could have *originally* been brought. The consent of the Defendant to appear in the transferee district does not bring that district within the purview of the statute.

II. Until the preliminary motions are disposed of and clear cut issues of fact are joined, it is impossible for the district judge to determine where the balance of convenience of parties and witnesses may lie.

III. The party seeking the transfer must show by a clear preponderance that Respondents' choice of forum should be disturbed. The Defendants have not satisfied this burden of proof.

ARGUMENT.

I.

A. THE ESTABLISHED RULES OF STATUTORY CONSTRUCTION DO NOT EMPOWER A TRANSFER TO THE DISTRICT COURT OF UTAH.

Respondents, in their Affidavit and Brief in the District allege (without denial by Defendants) that statutory venue does not exist in the transferee district (R. 76, 92).

Wherever possible, every word and clause of a statute must be given its full force and effect. The rule is clearly stated in Sutherland, *Statutes and Statutory Construction*, 3d Ed. Vol. 2, p. 339:

> "'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute' (citing cases). A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, . . ."

That is in accordance with the law as laid down by this Court in the case of *United States of America* v. *Menasche*, 348 U.S. 528, 538, 539, wherein this Court stated as follows at pages 538 and 539:

> "It is our duty 'to give effect, if possible, to every clause and word of a statute,' *Montclaire* v. *Ramsdell*, 107 U.S. 147, 152, 27 L.Ed. 431, 433, 2 S.Ct. 391; rather than to emasculate an entire section, as the government interpretation requires."

B. THE GRAMMATICAL ANALYSIS OF SECTION 1404(a) SUPPORTS THIS CONSTRUCTION.

Petitioner contends that the grammatical interpretation of the tense implies "might have been brought" refers

to the time of the transfer. He states in his Brief that the tense is in the pluperfect. The Oxford Universal Dictionary defines pluperfect as

> "Applied to that tense of the verb which expresses a time or action completed prior to some past point of time, specific or implied."

The point of time refers to one in the past, the time at which the suit was instituted. Section 1404(a) contains two verbs, "may transfer" and "might have been brought". The first verb is in the present tense, giving the District Court a present power; the second verb is in the pluperfect, otherwise known as past perfect, referring to a point of time in the past.

If the Congress intended to refer to the jurisdiction at the time of the transfer, the statute would have read "where it may be brought", using the present tense of "may" in both clauses of the sentence. The Congress saw fit to use the pluperfect, and refer the venue to a point of time in the past—a point of time prior to the transfer, not simultaneous with it.

C. TWO OR MORE FORUMS WERE CONTEMPLATED BY THE CONGRESS AT THE TIME SECTION 1404(a) WAS ENACTED.

Petitioner seeks not only to distort the clear wording of a statute, but to thwart the intent of the Congress, as well. H. R. Rep. No. 2646, 79th Cong. 2d Sess. (1946), p. A127, and H. R. Rep. No. 308, 80th Cong. 1st Sess. (1947), p. A132, state the purposes for the enactment of Section 1404(a), to remedy a situation presented in *Baltimore & Ohio R. Co.* v. *Kepner*, 315 U.S. 44 (1941), "which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred

in Ohio. The new subsection requires the court to determine the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." An examination of that decision, which the Congress felt was inequitable and should be the subject of remedial legislation, discloses that under Section 6 the Federal Employer's Liability Act (45 U.S.C. 56) an action may be brought in the district where the defendant resides, or where the cause of action arose. The accident occurred in Butler County, Ohio, adjacent to Hamilton County, wherein the employee resided, and defendant's railroad ran through both counties. The suit could have been brought in the district in which either Hamilton or Butler County lay, but the employee chose to file suit in the District Court for the Eastern District of New York.

Of the many cases of *forum non conveniens* that had been reported prior to 1946, the House Reports mention only one case, a 1941 case *where there was more than one forum open to the plaintiff*. The enactment of Section 1404(a) was intended to permit transfer of causes in that instance and only in that instance. If the intent of Congress had been otherwise, the House Reports would have pointed out different cases to illustrate the hardship they intended to remedy.

If the Congress had intended to give the district court the power to transfer a cause to *any* district, for the convenience of witnesses and in the interest of justice, without limitation, as contended by Petitioner, they would not have added the words of limitation, "where it might have been brought". But those words were added, this limitation must be observed, and the intent of the Congress must be honored.

D. RESPONDENTS' INTERPRETATION OF SECTION 1404(a) HAS BEEN ADOPTED BY OVERWHELMING MAJORITY OF DECISIONS.

An examination of the facts in reported cases where the doctrine of *forum non conveniens* has been applied discloses that in almost all cases there was more than one forum open to the plaintiff at the time the original suit was filed. Some of these decisions are:

1. *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947), 503. The opinion clearly states that plaintiff lived and defendant did business in Virginia, "where all events in litigation took place, where most of the witnesses reside, and where both state and federal courts are available to plaintiff and are able to obtain jurisdiction of the defendant".

2. *In re Josephson,* C.A.-1 (1954) 218 F. 2d 174, 183. "jurisdiction of the subject matter, and proper venue, exist both in the Federal Court for the District of Massachusetts and in the Federal Court for the District of New Mexico".

3. In *Anthony* v. *Kaufman,* C.A.-2 (1951), 193 F. 2d 85, the Court points out that one defendant could have been served in the transferee district.

4. In *Torres* v. *Walsh,* C.A.-2 (1955), 221 F. 2d 319, 321 (consolidated cases), a libel could have been brought in the transferee district in one case and the Pennsylvania Railroad could have been sued in Pennsylvania, the transferee district in the other case.

5. In *Paramount Pictures* v. *Rodney,* C.A.-3 (1951), 186 F. 2d 111, 114, "Suits embracing the identical subject matter could have been brought and, literally 'might have been brought', by the plaintiffs against the defendants in any district court in Texas".

II.

A. THE ORDER FOR TRANSFER WAS PREMATURE FOR THE REASON THAT ISSUES OF FACT HAD NOT YET BEEN JOINED AT THE TIME THE ORDER WAS ENTERED.

The Defendants each filed its "Answers and Motions to Dismiss" (R. 23, 53) and as grounds for dismissal claim, *inter alia*, that neither the partially owned and dissolved Utah subsidiary nor the newly created wholly owned Utah subsidiary were made parties defendant, and that they were indispensable parties; that the plaintiffs do not allege facts disclosing their right to bring a derivative suit, and that there is no common question of fact or law affecting the several rights of plaintiffs and of persons alleged to be similarly situated to plaintiffs.

It is submitted that until the preliminary motions are disposed of and issues of fact joined, it is impossible for the District Court to determine what witnesses or documentary evidence are important, the relative convenience or inconvenience of the forum, or whether, indeed, any testimony or evidence will ever be presented to this Court or any other Court. In *Webster-Chicago Corp.* v. *Minneapolis-Honeywell Regulator Co.*, D.C. Del. (1951), 99 F. Supp. 503, 506, the Court stated:

> "Assuming, then, that in this case the existence of a justiciable controversy will be denied by the defendant, then this issue must be first determined, for upon this the jurisdiction depends.
>
> "At the present stage of this case, however, it is not clear that the existence of a justiciable controversy may not be raised by motion as suggested by the defendant. For the determination of such motion witnesses may not be essential nor their convenience considered. If the existence of a justiciable contro-

versy becomes a factual issue determinable in some manner by affidavits, deposition or actual witnesses, then the necessity of such witnesses, their number and convenience may be considered in any subsequent proceedings."

One of the principal grounds relied upon for transfer is that "The majority of the class purported to be represented by plaintiff in this suit, both in number of holders and in number of shares held, reside in Utah or contiguous States" (R. 62-63); yet in their Motions to Dismiss Defendants state Plaintiffs are not representative of the class. These two contentions are mutually exclusive and that issue should have been decided before the Order of Transfer was entered.

If either of the Utah corporations is an indispensable party and they cannot be brought before the Illinois Court, this case may be disposed of without trial.

All preliminary motions should have been determined and issue joined before the Court should have entertained or determined the Motions for Transfer.

B. DIFFERENT ISSUES WOULD BE PRESENTED IF THE PLAINTIFFS SUE AS REPRESENTATIVES OF A CLASS RATHER THAN ON THEIR OWN BEHALF, ONLY, AND THIS SHOULD HAVE BEEN DETERMINED PRIOR TO THE ORDER OF TRANSFER.

The right of plaintiffs to recover damages if it can be shown that UTOCO, the partially owned subsidiary, was sold for less than its going concern value cannot be denied. The Motions to Dismiss do not include this as a ground for dismissal. In a similar case, *Lebold* v. *Inland Steel Co.*, C.A.-7 (1942), 125 F. 2d 369, 375, the Court said:

"The damages to be allowed are the difference between what plaintiffs have received from the sale of the physical assets and what the stock was really worth as stock in a going prosperous concern continuing business."

If Plaintiffs are not permitted to maintain their action as a derivative suit, they can surely proceed on behalf of themselves, as stockholders. But then the relative conveniences change: the suit is against the majority stockholders, Standard Oil Company and Standard Oil Foundation, Inc., for their allegedly oppressive action as majority stockholders. Their offices are in Chicago. The residence of the other stockholders becomes immaterial, whether such other stockholders are those Plaintiffs claim to represent or whether such other stockholders are those Plaintiffs claim were under the domination and control of the Defendants. Those stockholders would have no interest in the suit, as represented parties plaintiff, co-conspirators with the Defendants, or as witnesses.

If Plaintiffs are permitted to maintain this action solely on behalf of themselves, the considerations of conveniences change. *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1946). This was a stockholder's derivative action and this Court recognized differences in the considerations of convenience. At page 524 the Court states:

"Where there are only two parties to a dispute, there is a good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantage of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, or

(2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown."

The Court then distinguishes this situation from a derivative action:

"But where there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened."

Petitioner did not see fit to give any grounds for the Order for Transfer, there being no written decision or statement from the bench giving such grounds. His reasoning was not given until his Answer to the Petition for Writ of Mandamus before the Court of Appeals (R. 83-90). This Answer (prepared by Attorneys for Defendants) relies on the Brown affidavit and stresses the residences of the class for whom Respondents assume to act and the residences of the "controlled stockholders" (R. 88). He states that there will be "issues as to dominance and control". He has entirely ignored the possibility that this will not be a class action, but solely a suit between Plaintiffs and the majority stockholders; in which case there is no issue of dominance or control, no other stockholders are involved, and the weights and considerations of convenience and inconvenience change.

III.

THE PARTY SEEKING THE TRANSFER FAILED TO FULFILL THE BURDEN PLACED UPON THEM TO OVERCOME RESPONDENTS' CHOICE OF FORUM.

An examination of the Affidavit of Grant A. Brown in support of the Joint Motions for Transfer (R. 65-75) fails to disclose the name of a single witness who will be called to testify upon trials and fails to disclose the nature or location of a single document that Defendants plan to introduce in evidence. The record shows the executive offices of Standard Oil Company to be at 910 South Michigan Avenue, Chicago, Illinois (R. 49). The certification of the financial statements of Standard Oil Company and Utah Oil Refining Co. by Price, Waterhouse & Co. was issued at Chicago (R. 42).

It is clear that the burden of proving convenience or inconvenience is upon the party seeking the transfer. *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508:

> "But unless the balance is strongly in favor of the defendant, the plaintiffs' choice of forum should *rarely* be disturbed."

In *Ford Motor Co.* v. *Ryan,* C.A.-2 (1950), 182 F. 2d 328, 330, the Court of Appeals interpreted the quotation from *Gulf Oil Corp.* v. *Gilbert, supra*:

> "Those words we interpret to mean (a) that a defendant has the burden of making out a *strong case* for a transfer and (b) that the plaintiffs' privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against the 'convenience' as between 'the parties.'"

In separate concurring opinion by L. Hand, Chief Judge, at 332:

> "I wish to put my vote solely upon the ground that Sec. 15 of Title 15 U.S.C.A. gives to a plaintiff a privilege which a defendant must overcome by *more than a barç balance* of convenience *between the two forums* . . . a defendant must do more than show that the transfer will on the whole make the trial more convenient; *it must make the trial markedly more convenient.*"

See also *McKinney* v. *Southern Pacific Company*, D.C. Texas (1957), 147 F. Supp. 954; *National Tea Company* v. *Marseille*, D.C. N.Y. (1956), 142 F. Supp. 415; *Marks* v. *Fireman's Fund Ins. Co.*, D.C. N.Y. (1953), 109 F. Supp. 800.

This Court can take judicial knowledge of the enormous wealth of Standard Oil Company. It is not contended that the Respondents are impecunious. However, their relative means should have been considered by the trial judge. The court should "consider the ability of defendant . . . to transport their witnesses to the place of trial". 10 F.R.D. 596, 606.

The multi-state corporation should not be permitted to use its tentacles to require an individual, seeking redress for fraud, to seek to enforce his rights a thousand miles or more from the forum of his choice. The free and excessive use of the discretion granted in Section 1404(a) will not be in the interests of justice, and such discretion be used sparingly and in the rare case. These are the thoughts of Justice Black in his dissenting opinion in the *Gulf Oil* case:

> "For any individual or corporate defendant who does part of his business in states other than the one in which he is sued will almost invariably be put to some inconvenience to defend himself. It will be a poorly represented multi-state defendant who

cannot produce substantial evidence and good reasons fitting the rule now adopted by this Court tending to establish that the forum of the action against him is most inconvenient. The Court's new rule will thus clutter the very threshold of the federal courts with a preliminary trial of fact concerning the relative convenience of forums. The preliminary disposition of this factual question will, I believe, produce the very kind of uncertainty, confusion, and hardship which stalled and handicapped persons seeking compensation. . . . The broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible."

If litigants are permitted to clutter the record with long, vague affidavits, containing only generalizations, without a specific showing of the names and addresses of *key witnesses*, the trial judge will not be able properly to exercise the discretion granted him in Section 1404(a). The Defendants' Affidavit does not permit the Petitioner to make a rational determination of the relative conveniences of the forums involved. See *Ultra Sucro Co.* v. *Illinois Water Treatment Co.*, D.C. N.Y. (1956), 146 F. Supp. 393, 398:

"A third important consideration is the convenience of third party witnesses. Since parties tend to outdo each other in the sum total of possible witnesses they can locate in or near the district in which each would like to try the case, the judge must endeavor to determine who the *key witnesses* are rather than merely count up the possible witnesses for each side."

See also the article of Judge Irving R. Kaufman, 10 F.R.D. 595, 606:

> "A most important criterion, but one which has not appeared too often in cases is the ability of the parties to bear the expenses of trial in the transferee forum. Thus one court has said that a transfer to a forum out of reach of an impecunious plaintiff cannot be in the 'interests of justice' and it is undoubtedly this feeling which has led courts to consider the ability of the defendant railroads to transport their witnesses to the place of trial."

The uncontroverted Affidavit in opposition of the Motions for Transfer (R. 76-79) states that the principal place of business of Standard Oil Company to be in Chicago, with its own Standard Oil Building, executive and administrative offices and law department; that the decision as to the amount to be paid for UTOCO's assets must have been made by Standard Oil's executives in Chicago; that the physical description of UTOCO's properties and operations, appraisals of physical properties and oil and gas reserves and correspondence existed in the Chicago office.

Because the value of UTOCO's assets, as well as its value as a going concern, are the gist of Plaintiffs' case, it is apparent that expert testimony would be needed in order for the Court to determine these values. The Affidavit (R. 79) states that the testimony of engineers, business analysts and professional appraisers would be presented. These expert witnesses are far more available in a metropolis like Chicago than they would be in Salt Lake City, Utah.

The Petitioner states that the Affidavit in Opposition does not controvert the Affidavit in Support of the Motions for Transfer (R. 85). He fails to state that the

contrary is just as true: not one allegation in the Affidavit in Opposition is denied by the defendants. Yet Petitioner accepted the Affidavit in Support fully and completely. It is interesting to note that the *only* mention of the Affidavit in Opposition is to state that it does not controvert the other Affidavit.

There is a burden of proof on the party seeking the transfer. Perhaps there are different burdens in the transfer of a class action as compared with the burden when there are only two parties.

Petitioner has made unwarranted assumptions in his Answer, wherein he attempts, in retrospect, to justify the Order for Transfer: the business of the purchasing corporation would be "disrupted by the absence of its officers and directors to attend pre-trial and trial proceedings of this suit in Chicago" (R. 89). The assumption goes farther than the Affidavit in Support, which does not state that the officers and directors will ever be witnesses.

Petitioner attempts to justify the Order for Transfer by referring to the difficulty and problems of conflict of laws because the substantive law would be that of Utah. To this rationalization see *Lewald* v. *York Corporation*, D.C. N.Y. (1946), 68 F. Supp. 386, 388, where the Court paraphrases *Williams* v. *Green Bay & Western Railroad Co.*, 326 U.S. 549, as holding:

> "In hornbook fashion we may isolate the court's proposition thus: The following do not want a district court's declination of jurisdiction:
>
> (1) The mere fact that the case involves the internal affairs of a foreign corporation.
>
> (2) The fact that the case is governed by the corporation law of a state other than the one in which the district court sits.

(3) The difficulty of deciding the corporation law of a foreign state.

(4) The fact, alone, that the claim involves complicated affairs of a foreign corporation."

Respondents contend that the Order for Transfer was entirely unwarranted, not for the convenience of the parties or the witnesses, not in the interests of justice, and constitute an abuse of the discretion vested in Petitioner under Section 1404(a).

CONCLUSION.

For the reasons set forth, Respondents contend that the Court of Appeals for the Seventh Circuit correctly construed Petitioner's authority under Section 1404(a). In view of the premature decision and abuse of discretion by the Petitioner (which the Court of Appeals found unnecessary to decide) Respondents respectfully urge that the decision should be affirmed.

Respectfully submitted,

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